Supreme Court, U.S.
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No. 93-253

IN THE
Supreme Court of the United States
OCTOBER TERM, 1993

DEBRA J. GRUNWALD, *et al.*,

Petitioners,

v.

SAN BERNARDINO CITY UNIFIED SCHOOL DISTRICT, *et al.*,

Respondents.

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT

PETITION FOR A WRIT OF CERTIORARI

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August 1993

QUESTIONS PRESENTED

I. Do the procedural safeguards mandated by the First and Fourteenth Amendments to the United States Constitution as enumerated in *Chicago Teachers Union v. Hudson*, 475 U.S. 292 (1986), for the compulsory exaction of union fees from the wages of nonunion public school teachers include:

A. pre-collection reduction of an objecting teacher's dues-equivalent fees by that amount which the union concedes is spent on constitutionally nonchargeable activities, rather than the forced exaction of both the chargeable and nonchargeable amounts and placement of those amounts, including the concededly nonchargeable amounts, in escrow for two and one-half months before refunding the amount improperly seized; and

B. pre-collection distribution of the notice required by *Hudson*, rather than post-collection distribution two to three weeks after the first seizure?

PARTIES TO THE PROCEEDINGS BELOW

In addition to the parties named in the caption, the parties to the proceedings below were:

Petitioners: Lewis N. Adams, Vicki F. Burdeaux, Maria L. Busselle, Delores Camara, Janice Cody, Juliana Coughlin, Sally K. Delnort, Susan Dent, Aeryn G. DeWalle, Glenn Drewes, Dolores Dudek, Alan Dyer, Charles W. Eastwood, Sharon Gardner, Robert W. Greenfield, Heidi Hanson, Nola Hirdman, Rita M. Hoffman, Michelle Jenkins, David A. Jognia, Martha Kadow, Michael S. Klempner, Joe Koegal, Barbara F. Larrabee, Alen Mathey, John P. Middlewood, Ron Nelson, Vicky Nelson, Teresa Odell, Patricia Olson, Raymond L. Olson, Jaimee A. O'Neill, Lloyd C. Pack, Jr., Ruth Padres, Charles Reynolds, Janice Rider, Mary C. Roundy, Sandi Sidor, Margaret Speiess, Debora Stainbrock, Ben Suescum, Mario Torres, Tirsh J. Triana, Bart Walsh, Michael D. Walsh, III, Kenneth L. Weichel, Elizabeth M. Willis, and De Vere Wolsey.

Respondents: Shelby Obershaw, President, San Bernardino City Unified School District ("SBCUSD"), in her official capacity; Hardy L. Brown, Vice President, SBCUSD, in his official capacity; Elisa Diaz, Marlin L. Brown, Howard B. Grossman, Dr. Chuck Christie, and Lawrence E. Neigel, members of the SBCUSD School Board, in their official capacities; E. Neal Roberts, Superintendent of SBCUSD, in his official capacity; Joseph Woodford, Director of Employee Relations for SBCUSD, in his official capacity; and the San Bernardino Teachers Association.

The California Teachers Association and the National Education Association were originally defendants in the district court, but plaintiffs dismissed them from the action on June 30, 1988.

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SAN BERNARDINO CITY UNIFIED SCHOOL DISTRICT, *et al.*,

Respondents.

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT

Petitioners Debra J. Grunwald, *et al.*, respectfully pray that a writ of certiorari issue to review the judgment and opinion of the United States Court of Appeals for the Ninth Circuit entered on May 19, 1993, in case No. 88-6617.

OPINIONS BELOW

The majority and dissenting opinions of the court of appeals are reported at 994 F.2d 1370 and are reprinted in the Appendix ("App.") to this Petition at 1a-18a. The unreported order granting the petition for rehearing, rejecting the suggestion for rehearing *en banc* and withdrawing the panel's original opinion is reprinted at App. 19a. The original opinion of the court of appeals' panel is reported at 917 F.2d 1223 and is reprinted at App. 20a-38a. The unreported final opinion and judgment of

the United States District Court for the Central District of California is reprinted at App. 39a-43a.

JURISDICTION

The original judgment of the court of appeals was entered on October 31, 1990 (App. at 20a). A timely petition for rehearing was granted on June 9, 1992 (App. at 19a), and the subsequent judgment was not filed until May 19, 1993 (App. at 1a). This petition is filed within ninety days of that date. *See* Supreme Court Rule 13.4. The jurisdiction of this Court is invoked under 28 U.S.C. § 1254(1) (West Supp. 1993).

CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED

The First Amendment to the United States Constitution states in pertinent part: "Congress shall make no law * * * abridging the freedom of speech * * * or the right of the people peaceably to assemble, and to petition the Government for a redress of grievances." **Section 1 of the Fourteenth Amendment** maintains: "[N]or shall any State deprive any person of life, liberty, or property, without due process of law."

The Civil Rights Act of 1871, 42 U.S.C. § 1983 (1981), says in relevant part:

> Every person who, under color of any statute, ordinance, regulation, custom, or usage, of any State * * * , subjects, or causes to be subjected, any citizen of the United States or other person within the jurisdiction thereof to the deprivation of any rights, privileges, or immunities secured by the Constitution and laws, shall be liable to the party injured in any action at law, suit in equity, or other proper proceeding for redress.

The **state statutes** involved are the California Education Employee Relations Act ("EERA"), California Gov't Code §§ 3540.1(i)(2), 3546 (West Supp. 1993); the California Educ. Code § 45061 (West Supp. 1993). Their pertinent provisions are reprinted at App. 44a.

STATEMENT OF THE CASE

Petitioner Debra Grunwald and the other forty-eight petitioning nonunion teachers ("teachers") filed suit in the district court under 42 U.S.C. § 1983, alleging that the procedure by which Respondents San Bernardino Teachers Association ("Association" or "union") and San Bernardino City Unified School District ("District") collect agency shop fees[1] from nonmember teachers violates their First and Fourteenth Amendment rights as enumerated by *Chicago Teachers Union v. Hudson*, 475 U.S. 292 (1986). App. at 4a, 41a.

The teachers challenged the procedure because it fails to provide "advance notice" and "advance reduction" of the fees. The union does not distribute the notice required by *Hudson* to nonmembers until several weeks **after** the first fee deductions occur on September 30. Moreover, the amount of the fees automatically deducted from nonmembers **is equal to** 100% of members' dues, although the notices admit the union's chargeable expenditures are less than 100% of dues. Each fee deduction made by the District is in the amount of one-tenth of the annual membership dues.[2] If a nonmember objects to the

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[1]Pursuant to Cal. Gov't Code §§ 3540.1(i)(2), 3546, the Association and the District have an agency shop agreement which requires teachers who choose not to join the union to pay a fee to the union for acting as their bargaining representative and to offset their pro rata share of the costs of that representation. App. at 2a.

[2]Pursuant to Cal. Educ. Code § 45061, the agency fees are automatically deducted by the District during the ten-month school year, with the first deduction occurring on September 30 and the last on June 30.

amount of the dues-equivalent fee, the union eventually sends him or her a rebate check[3] for the portion of the fee the union stated in the notice was attributable to matters unrelated to collective bargaining. App. at 2a-4a.

The district court ruled that these aspects of the union's agency fee procedure were constitutional and denied the teachers' requests for temporary, preliminary and permanent injunctions against the collection of dues-equivalent fees.[4] App. at 23a, 42a. The court held that *Hudson* does not require advance reductions in the amount of fees exacted when the union initially places all nonmember funds into an escrow account. The court also declared *Hudson* does not require the *Hudson* notices to be distributed in advance of the fee deductions. App. at 41a.

On November 3, 1988, the teachers timely appealed the district court's denial of the injunctions against fee collections and the approval of the union's collection procedures. Specifically, the appeal challenged the constitutionality of the union's

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[3]The 1987-88 procedure reviewed by the district court permitted the annual rebate for objecting teachers who accepted the union's calculation of the chargeable percentage to be issued by December 7 but delayed the issuance of the rebate for objectors who challenged the union's calculation and requested the opportunity to have the amount of the fee determined before a neutral decisionmaker until after receipt of the neutral's decision. Thus, objectors received the entire year's rebate after paying three-tenths of the annual agency fee (via deductions at the end of September, October and November). Challengers did not receive their rebate checks for the entire year until after the March 31 fee deduction and after paying seventh-tenths of the annual fee.

[4]The district court did issue a temporary restraining order and a preliminary injunction requiring the union to place all agency fees collected in an escrow account, and a permanent injunction ordering the union to include language in its procedural notice stating the union bears the burden of proof on the issue of what percentage of fees is chargeable to collective bargaining. The court also ordered the union to pay a rebate to all teachers named on the complaint, even if they had not followed the formal objection procedures required by the union.

failure to provide advance notice and advance reduction of the fee amount. App. at 4a, 21a, 24a, 26a-29a.

On October 31, 1990, the panel, in an opinion written by Circuit Judge Brunetti in which Circuit Judge D.W. Nelson joined (and from which Circuit Judge Kozinski vehemently dissented), originally reversed the district court's approval of the union's refusal to provide advance notice and advance reduction of the fee amount.[5] App. at 20a-38a.

Notwithstanding *Hudson*'s incorporation of the comments of Thomas Jefferson and James Madison about the tyrannical character of forcing an individual to contribute even "three pence" for the "propagation of opinions which he [or she] disbelieves," 475 U.S. at 305, Judge Kozinski dissented because he considered the amount and type of the teachers' claim too insignificant to warrant consideration by the overburdened federal judiciary.[6] In fact, Judge Kozinski later cited *Grunwald*

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[5]The original panel declared: "We * * * hold that advance reductions of agency shop fees are required by *Hudson* even where the agency fee procedure includes an escrow of 100% of the collected agency fees. Because the collection of agency shop fees infringes nonunion employees' First Amendment rights, the procedure for the collection of the fees must be carefully tailored to minimize the infringement. In order to be carefully tailored, the union must deduct only the amount it is entitled to, i.e. the amount arguably related to its collective bargaining expenses.

Advance notice must be given to protect the nonmember's first amendment interest—a fair opportunity to identify the impact of the government action on his interests and assert a meritorious first amendment claim.

We * * * hold that notice of and adequate information concerning the agency fee must be given to all nonmembers *before* any fees may be collected from them." App. 27a-28a, 29a (citations and footnote omitted; emphasis in the original).

[6]For example, Judge Kozinski opined: "This case is about $8 a month in union agency fees. And it's not even about *who* gets the $8—everybody agrees that [the teachers] are entitled to the money—but about the precise timing and procedure for the rebate. It is over such a trifle—such a *bagatelle*, as the

as an example of litigation that is "a bludgeon for striking at political adversaries," not "a tool for vindicating important rights." *McCalden v. California Library Ass'n*, 955 F.2d 1214, 1227 (9th Cir.), *cert. denied*, ___ U.S. ___, 112 S. Ct. 2306 (1992) (Kozinski, J., dissenting from the order rejecting the suggestion for rehearing *en banc*).

Then, on June 9, 1992, Circuit Judges Nelson and Kozinski voted to grant the union's petition for rehearing (Circuit Judge Brunetti dissenting) and to withdraw the opinion of October 31, 1990. On May 19, 1993, a new opinion—now written by Circuit Judge Kozinski in which Circuit Judge D.W. Nelson joined (and from which Circuit Judge Brunetti dissented)—was issued. The new panel majority now affirmed the district court and held that the union's "objection process does not impermissibly impinge on the plaintiffs' First Amendment rights." App. at 12a.

Although the new panel majority admitted that *Hudson* had established the advance reduction as "the **preferred** method of doing things," App. at 9a (emphasis added),[7] it, nevertheless,

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French would call it—that this lawsuit is brought, with all the attendant costs and burdens of modern litigation. * * * [The teachers'] frustration is understandable, but they have chosen the wrong forum for resolving what is essentially a political dispute.

We do the judicial system, and the society it serves, serious harm when we countenance such *bagatelle* litigation. Life in modern society is complicated and not every dissatisfaction should find a remedy in court. * * * We have a responsibility to avoid encouraging such lawsuits, which are not only costly to the parties involved but divert scarce judicial resources from more pressing and significant issues." App. 32a, 38a (Kozinski, J., dissenting) (emphasis in original).

[7]"Requiring agency fee payers to go through the inconvenience, embarrassment and delay of recovering even a small sum—practically a sum so small it's hardly worth the hassle—is a burden they cannot be required to bear, unless there's a **compelling** reason for requiring it and the procedure itself is reasonable.

held that the union had provided an adequate explanation for resorting to the "deduction-escrow-refund" procedure. The panel majority believed that since

> [p]ublic school teachers are employed on a school year by school year basis [with v]irtually all new employees begin[ing] work at the same time—around September 1, when the academic year starts[,] * * * it would be highly impractical for the union to separate members from nonmembers and determine the affiliations and addresses of the new teachers before the first monthly paycheck, which comes at the end of September. Because the procedure is reasonable in light of the annual and fluctuating nature of elementary school employment and the burden on agency fee payers is relatively slight, we hold that this is the type of "appropriately justified advance reduction" approved by the Court in *Hudson*. 475 U.S. at 309.

App. at 9a-10a (citations omitted).

Circuit Judge Brunetti, now in dissent, agreed with the teachers that this Court's precedents concerning compulsory union fees require an advance reduction.

> Where the [union's] procedure fails is that it is not "carefully tailored to minimize the infringement" on nonmembers' First Amendment rights, because for four months it deprives the fee payer of amounts that are

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We interpret th[e] language in *Hudson* as expressing a **strong preference** for identifying nonunion members early enough so that the deduction-escrow-refund procedure can be **avoided altogether**. To employ the more cumbersome and **intrusive** deduction-escrow-refund procedure, the union must provide an 'adequate explanation,' which we interpret to mean that the union must show that the **preferred** method of doing things is **impossible** or, at any rate, far more costly or cumbersome." App. at 8a-9a (footnote omitted, emphasis added).

> to be refunded. The District and the Union fail to justify their failure to use procedures which they have already tried or considered which impinge less on the fee payers' rights. In fact, the procedure as adopted is obviously for the convenience of the District and the Union with no consideration of the infringement on the fee payers' rights.

App. at 15a (footnote omitted) (Brunetti, J., dissenting).

Although the original majority discussed and found unconstitutional the union's failure to provide advance notice of the fee deductions, the new panel majority's opinion is devoid of any discussion of the "advance notice" issue. Since it affirmed the district court, which had found that *Hudson* did not require notice to be given in advance of the first deduction of dues-equivalent fees, the panel majority *sub silentio* held that advance notice of property seizures is never required by the First and Fourteenth Amendments.

REASONS FOR GRANTING THE WRIT

I. THE QUESTIONS PRESENTED BY THIS CASE SHOULD BE SETTLED BY THIS COURT BECAUSE OF THE EXCEPTIONAL IMPORTANCE OF DUE PROCESS IN PROTECTING FIRST AMENDMENT FREEDOMS AND THE RECENT CONFUSION OF THE COURTS OF APPEALS AS TO THEIR RESOLUTION

Seven years ago, this Court unanimously enunciated the procedural safeguards the Constitution requires a union and the government to provide "for the collection of agency fees" from nonunion employees, *Hudson*, 475 U.S. at 310, *see also id.* at 306, 309. Initially, the lower federal and state courts interpreted *Hudson* to require both an advance reduction and advance notice of the amount of agency fees as part of the procedural safeguards necessary for the constitutional collection of agency

fees from objecting nonmembers.[8] However, within the last three years, a conflict has developed among the lower courts over both issues.[9]

Shortly after the conflict among the circuits first occurred, this Court granted certiorari to review the Eleventh Circuit's

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[8]*See Damiano v. Matish*, 830 F.2d 1363, 1369-70 (6th Cir. 1987); *Tierney v. City of Toledo*, 824 F.2d 1497, 1502-06 (6th Cir. 1987) (*Tierney I*); *accord Cheeseman v. Jay Sch. Corp. Classroom Teachers Ass'n*, 527 N.E.2d 715, 718 (Ind. App. 4th Dist. 1988).

Even before *Hudson*, most lower courts were requiring advance reduction and advance notice. *See Galda v. Rutgers*, 772 F.2d 1060, 1068 (3d Cir. 1985), *cert. denied*, 475 U.S. 1065 (1986) (*Galda II*); *Hudson v. Chicago Teachers Union*, 743 F.2d 1187, 1192, 1199 (7th Cir. 1984), *aff'd*, 475 U.S. 292 (1986); *Galda v. Bloustein*, 686 F.2d 159, 167, 168 n.16 (3d Cir. 1982) (*Galda I*); *Seay v. McDonnell Douglas Corp.*, 427 F.2d 996, 1004 (9th Cir. 1970); *In re Bd. of Educ. of Town of Boonton*, 494 A.2d 279, 293-94 (N.J. 1985), *cert. denied sub nom. Kramer v. Public Empl. Rel. Comm'n*, 475 U.S. 1072 (1986); *Carlson v. AFSCME*, 700 P.2d 260, 268 (Or. App.), *review denied*, 710 P.2d 147 (Or. 1985); *contra Beck v. Communications Workers*, 776 F.2d 1187 (1985) (2-1 decision), *aff'd en banc*, 800 F.2d 1280 (4th Cir. 1986) (6-4 decision), *aff'd*, 487 U.S. 735 (1988); *Robinson v. New Jersey*, 741 F.2d 598 (3d Cir. 1984), *cert. denied*, 469 U.S. 1228 (1985).

[9]*Compare Hohe v. Casey*, 956 F.2d 399, 405-06, 414 (3d Cir. 1992) (*Hohe II*); *Dashiell v. Montgomery County*, 925 F.2d 750, 754, 756 (4th Cir. 1991); *Dean v. TWA*, 924 F.2d 805, 808, 809 (9th Cir. 1991); *Tierney v. City of Toledo*, 917 F.2d 927, 936-37 (6th Cir. 1990) (*Tierney II*); *Schneider v. Colegio de Abogados*, 917 F.2d 620, 634-35 & n.22 (1st Cir. 1990), *cert. denied*, ___ U.S. ___, 112 S. Ct. 865 (1992); *Smith v. Regents of Univ. of Cal.*, 844 P.2d 500, 513 (Cal. 1993) (5-2 decision), *petition for cert. filed* (U.S. July 14, 1993) (No. 93-82) (cases requiring advance reduction and/or advance notice) *with Grunwald v. San Bernardino City Unified Sch. Dist.*, 994 F.2d 1370 (9th Cir. 1993) (2-1 decision), App. at 1a; *Gibson v. Florida Bar*, 906 F.2d 624, 631 (11th Cir. 1990) (2-1 decision), *cert. dismissed*, ___ U.S. ___, 112 S. Ct. 633 (1991); *Crawford v. Air Line Pilots*, 870 F.2d 155, 160-61 (1989), *adopted*, 992 F.2d 1295 (4th Cir. 1993) (*en banc*); *Jerabek v. Public Empl. Rel. Bd.*, 4 Cal. Rptr. 2d 181 (Cal. App. 3d Dist.), *cert. denied*, ___ U.S. ___, 113 S. Ct. 56 (1992) (cases not requiring advance reduction and/or advance notice).

approval in *Gibson v. Florida Bar*, 906 F.2d 624 (11th Cir. 1990), of the Florida Bar's procedures for handling objections to the Bar's use of compulsory bar dues to fund its political lobbying.[10] *Gibson v. Florida Bar*, ___ U.S. ___, 111 S. Ct. 1305, *cert. dismissed*, ___ U.S. ___, 112 S. Ct. 633 (1991).

Like the union's procedures approved by the Ninth Circuit herein, the Bar's procedures approved by the Eleventh Circuit failed to provide objectors with either pre-collection reduction or notice of the dues amount. *Gibson*, 906 F.2d at 627-29 & n.8. Moreover, the questions presented by the *Gibson* certiorari petition included both the advance reduction and advance notice issues. *See*, Petition for a Writ of Certiorari, *Gibson* (No. 90-1102).

However, after the Florida Supreme Court's decision in *Florida Bar Re Frankel*, 581 So.2d 1294 (Fla. 1991), which adopted the advance reduction requirement by limiting all dues as a matter of state law to the constitutionally chargeable amount, this Court dismissed the writ of certiorari as improvidently granted, *Gibson v. Florida Bar*, ___ U.S. ___, 112 S. Ct. 633 (1991).

During the two years since this Court dismissed *Gibson*, the resolution of the advance reduction and advance notice issues has continued to split the lower courts. *See supra* note 9. Once again these significant questions of first amendment due process[11] are firmly presented in the record of this case.

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[10]In *Keller v. State Bar of California*, 496 U.S. 1, 15-17 (1990), this Court held that as a pre-condition to collecting compulsory dues, an integrated bar must adopt procedures to prevent the use of objectors' dues for constitutionally impermissible purposes, such as "the sort of procedures described in *Hudson*." *Id.* at 17.

[11]Freedoms guaranteed by the First Amendment are "rights which we value most highly and which are essential to the workings of a free society." Therefore, in protecting First Amendment rights, "the **procedures** * * * assume an importance fully as great as the validity of the substantive rule of law to be

Furthermore, these are important questions due to the large number of public employees whose First Amendment freedoms are burdened by compulsory union fee arrangements. As of 1987, almost 3.9 million public employees are subjected to such compulsion in the twenty states and the District of Columbia that permit or require payment of monies to the union as a condition of public employment. U.S. DEP'T OF COM., 3 CENSUS OF GOV'TS, PUB. EMPL. (1987). And, of course, the Court's disposition of these questions could also be precedential in integrated bar cases, because of the "substantial analogy" between the integrated bar and compulsory union fee arrangements. *See Keller*, 496 U.S. at 11.

This Court granted certiorari in *Hudson* and *Ellis v. Railway Clerks*, 466 U.S. 435 (1984), to twice consider the constitutionality of procedures adopted by unions to determine the amount of compulsory deductions and respond to nonmembers' objections. Indeed, in *Hudson*, as here, the only questions presented concern what procedural safeguards are required by the First and Fourteenth Amendments for the collection of compulsory fees. The Court explicitly cited the "importance of the case, and the divergent approaches of other courts to the issue," as reasons for granting certiorari. *Hudson*, 475 U.S. at 300. Now a panel majority of the Ninth Circuit has denied the procedural safeguards established by this Court.

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applied." *Speiser v. Randall*, 357 U.S. 513, 520 (1958) (emphasis added); *see Hudson*, 475 U.S. at 303 n.12.

II. IN ALLOWING THE "DEDUCTION-ESCROW-REFUND" OF THE NONCHARGEABLE AMOUNT OF AN OBJECTOR'S AGENCY FEE, INSTEAD OF REQUIRING AN "ADVANCE REDUCTION," THE PANEL MAJORITY'S DECISION CONFLICTS WITH THIS COURT'S DECISIONS IN *HUDSON*, *BECK*, *ELROD* AND DECISIONS OF OTHER UNITED STATES COURTS OF APPEALS

A. The Conflict With *Hudson*, *Beck* and *Elrod*

Following rehearing, the new panel majority held, Circuit Judge Brunetti dissenting, that an "escrow scheme poses no risk that [the teachers'] substantive free speech rights will be violated," and thus, "obviate[s] the need for advance reductions" because "*Abood [v. Detroit Bd. of Educ.*, 431 U.S. 209 (1977)], *Ellis* and *Hudson* * * * categorically prohibit only one type of First Amendment harm: use of nonmembers' money to promote causes they do not believe in." App. at 5a & n.2, 7a; *contra id.* at 14a-15a, 17a-18a (Brunetti, J., dissenting).

That holding conflicts with *Hudson*, which clearly recognized the right to be free from the **collection** of union fees as a First Amendment right, which may be infringed only to serve the compelling state interest of reimbursing a union for its costs of collective bargaining, and then only through narrowly drawn procedures that minimize the risk that any more might be collected. 475 U.S. at 302-03 & n.10.

This Court prescribed procedural safeguards to ensure against **both** excessive collections **and** misuse of the fee once collected. Had this Court been concerned only with misspending or misuse, as the panel majority contended, then it would have accepted the union's post-deprivation remedy of 100% escrow and required a prompt review of the union's calculation of the fee amount by an impartial decisionmaker, since these are the only remedies needed to "eliminate[ ] the risk that nonunion

employees' contributions may be * * * used for impermissible purposes." *Hudson*, 475 U.S. at 309.[12]

Because the collection violations cannot be remedied by an escrow, this Court firmly rejected the union's argument that a 100% escrow "eliminates any valid constitutional objection * * * and thereby provides an adequate remedy in this case." Instead, the Court found "the procedure remain[ed] flawed * * * [because i]t does not provide an adequate explanation for the **advance reduction of dues**." *Id.* (emphasis added). Moreover it specifically ruled that "[a] forced **exaction** followed by a **rebate** equal to the amount improperly expended is thus not a permissible response to the nonunion employees' objections." *Id.* at 305-06 (emphasis added).[13]

Accordingly, *Hudson* held "the **constitutional** requirements for the union's **collection** of agency fees include an **adequate**

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[12]This Court also would not have proclaimed that "in this context, the procedures required by the First Amendment also provide the protection necessary for any **deprivation of property**." *Hudson*, 475 U.S. at 304 n.13 (emphasis added). Furthermore, the Court knew from the Seventh Circuit that the question presented in *Hudson* involved more than the use of the objectors' money. "The question here is whether the [objecting teachers] have a federal right to challenge a procedure that may not have resulted in any improper expenditures—whether, in other words, even if the union has **not used** any of the money it has collected from objecting employees * * * [the objecting teachers] can still complain that they have been **deprived** of the liberty secured them by the Constitution. **We think they can** * * *." *Hudson*, 743 F.2d at 1192 (emphasis added). Even though there may have been no use violation, only a collection violation, this Court found that the objecting teachers had "established a constitutional violation," for which the district court should fashion a proper remedy. *Id.*, 475 U.S. at 309 n.22.

[13]Two years after *Hudson*, this Court applied this principle to the private-sector. "[U]nions [are not] free to **exact** dues equivalents from nonmembers in any amount they please, no matter how unrelated those fees may be to collective bargaining activities. * * * Congress * * * authoriz[ed] the **collection** of **only** those fees necessary to finance collective bargaining activities." *Communications Workers v. Beck*, 487 U.S. 735, 759 (1988) (emphasis added).

explanation of the **basis** for the fee, a reasonably prompt opportunity to challenge the amount of the fee before an impartial decisionmaker, and an **escrow** for the amounts **reasonably in dispute** while such challenges are pending." *Id.* at 310 (emphasis added).

The panel majority also cited *Ellis*, 466 U.S. at 443-44, which identified "advance reduction of dues and/or interest-bearing escrow accounts" as "readily available alternatives" to the statutorily and constitutionally impermissible "pure rebate approach." *See* App. at 5a-8a. However, as *Hudson* explains, *Ellis* merely "noted the possibility of 'readily available alternatives, such as advance reduction of dues and/or interest-bearing escrow accounts.'" *Ellis* did not decide whether an interest-bearing escrow account, **by itself**, would be constitutionally sufficient, since, "for purposes of [*Ellis*], it was sufficient to strike down the rebate procedure." *Hudson*, 475 U.S. at 304 (quoting *Ellis*, 466 U.S. at 444). That question was reached for the first time in *Hudson*, because the union there had established an escrow for 100% of the objectors' service fees. Unlike *Ellis*, the amount of fees collected was less than union dues, because the union had made a 5% advance reduction[14] for activities not germane to collective bargaining and contract administration. *Id.* at 295-96, 304.

As recognized by Circuit Judge Brunetti, *Hudson* answered that question by, first, requiring escrow only "for the amounts **reasonably in dispute** while such challenges are pending," not all amounts, including sums the union admits it is not entitled to keep. App. at 13a (Brunetti, J., dissenting) (quoting *Hudson*, 475 U.S. at 310) (emphasis added). Furthermore, "an independent audit, **in advance, coupled with adequate notice**, might

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[14]The fact that the teachers' union in *Hudson* provided an "advance reduction" repudiates the panel majority's claim that the deductions of full union dues from the teachers in this case "is the type of 'appropriately justified advance reduction' approved by the Court in *Hudson*." App. at 10a; *see also* App. at 13a (Brunetti, J. dissenting).

reduce the size of any appropriate escrow." *Hudson*, 475 U.S. at 310 (emphasis added).

Then, this Court held that **in addition** to that escrow, and other safeguards, an "appropriately justified **advance reduction** * * * **[is] necessary** to minimize both the impingement [on nonunion employees' First Amendment interests] and the burden" of objection. *Id.* at 309 (emphasis added). Thus, *Hudson* requires **both** escrow of the amounts in dispute **and** advance reduction of the amounts undisputedly attributable to ideological and other purposes unrelated to collective bargaining.[15]

Notwithstanding the clarity of the requirements of *Hudson*, the panel majority still doubted that the teachers had suffered "a substantive First Amendment injury because they are denied use of their money temporarily, so they can't use it to promote First Amendment causes they support." App. at 7a.[16]

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[15]*Hudson*, 475 U.S. at 294, also opens with this significant quotation: "In *Abood*, 'we found * * * [t]he union * * * could not, consistently with the Constitution, **collect** from dissenting employees any sums for the support of ideological causes not germane to its duties as collective-bargaining agent.' *Ellis*, 466 U.S. at 447. The *Ellis* case was primarily concerned with the need 'to define the line between union expenditures that all employees must help defray and those that are not sufficiently related to collective bargaining to justify their being **imposed** on dissenters.' *Ibid.* In contrast, this case concerns the constitutionality of the **procedure** * * * to draw that **necessary line** and to respond to nonmembers' objections to the manner in which it was drawn." (Citations omitted; emphasis added).

[16]The panel majority also opined: "Any other conclusion would turn every tax refund suit—indeed every monetary claim against an entity acting under color of law—into a First Amendment case." App. at 7a. By this exaggeration, the panel majority hopes to obscure the fact that every tax refund suit and every monetary claim against a governmental entity does not involve an underlying seizure of property that, like the agency shop, is itself an "infringement on * * * constitutional rights * * * protected by the First Amendment [that] requires * * * procedure[s to] be carefully tailored to minimize the infringement." *Hudson*, 475 U.S. at 303 (footnotes omitted); *see also id.* at 309.

However, prior to *Hudson* this Court had found the deprivation of the use of one's money, no matter how small,[17] a substantive First Amendment injury in *Elrod v. Burns*, 427 U.S. 347, 355-56 (1976) (plurality opinion) (citations omitted; emphasis added).

> The cost of the practice of patronage is the **restraint it places on freedoms of belief and association.** * * * [A]ny assessment of [the objecting employee's] salary is tantamount to coerced belief. * * * Since the average public employee is hardly in the financial position to support his party and another, or to lend his time to two parties, **the individual's ability to act according to his beliefs and to associate with others of his political persuasion is constrained**, and support for his party is diminished.

Accord Branti v. Finkel, 445 U.S. 507, 513 n.8 (1980).[18]

Although the panel majority admitted *Hudson* expressed "a strong preference for identifying nonunion members early enough so that the deduction-escrow-refund procedure can be avoided altogether," it, nevertheless, held that agency fee payers can be required "to go through the inconvenience, embarrassment and delay of recovering even a small sum—practically a sum so small it's hardly worth the hassle—* * * [if] there's a compelling reason for requiring it." Later, the panel majority

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[17]"This Court's decisions have prohibited conditions * * * which dampen the exercise generally of First Amendment rights, however slight the inducement to the individual to forsake those rights." *Elrod*, 427 U.S. at 556 n.11. "Rights are infringed both where the government fines a person a penny for being a Republican and where it withholds the grant of a penny for the same reason." *Id.* at 557 n.13.

[18]As already demonstrated *supra* pp. 12-14, *Hudson* specifically extended these principles to the "Union's collection of agency fees." *Id.* at 310 (emphasis added); *see also id.* at 309.

even whittled "compelling reason" down to "an adequate explanation" by the union. App. at 8a-9a.

The "adequate explanation" accepted by the panel majority was: "Public school teachers are employed on a school year by school year basis * * * [which creates an] annual and fluctuating nature of elementary school employment * * * ." *Id.* at 9a, 10a. Moreover, the panel majority accepted the union's assertions that it needs "the home addresses of all new teachers and, most importantly, the names of the teachers who choose to be agency fee payers that year" which are not available "before the first monthly paycheck, which comes at the end of September."[19] *Id.*

Though the panel majority recognized that there are other systems "that would minimize further the burden on agency fee

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[19]These assertions are "red herrings." First, home addresses are not needed to provide nonmembers with their *Hudson* notices. The notices can be delivered to their school addresses, which both the school district and union know shortly after school starts in September. Second, the panel majority mistakenly asserts that teachers "choose to be agency fee payers." App. at 9a. This statement presumes that all new employees are automatically union members, unless they have taken some affirmative act to "be[come] agency fee payers." However, a "policy of voluntary unionism" is imbedded in the collective bargaining legislation of this country. *See Pattern Maker's League v. NLRB*, 473 U.S. 95, 104-07 (1985). This policy "protects the employment rights of the dissatisfied member [who resigns], as well as those of the worker who never assumed full union membership." *Id.* at 106. Therefore, rather than automatically being union members, all new employees are automatically nonmembers until they take some affirmative act to assume full union membership. Accordingly, the union does not need a month to determine which new teachers "choose to be agency fee payers." Instead, at the beginning of September it can quickly compare the list of new and returning teachers, provided by the district, with its own list of union members. It will immediately know and have time to send the *Hudson* notice to all nonmember teachers before the first pay check is issued on September 30.

payers," it rejected them,[20] because they would require "the school district and the union to bear [an] additional administrative burden." *Id.* at 10a n.7.

Circuit Judge Brunetti correctly compared the union's problematic excuses to "the District [and the union] refusing to follow *Brown v. Board of Education*, 349 U.S. 294 (1955), because integration imposes too much of an administrative burden." Moreover, the union's objection to delay "collection of the fee until December" "does not hold water," either, because "the Union is already 'deprived' of the agency fees for four months of each year (because the fees go straight into escrow and do not come out until rebates are paid)." App. at 17a (Brunetti, J., dissenting).

> The majority baldly asserts that "the Constitution [does not] require[ ] the school district and the Union to bear the additional administrative burden of operating a[n advance reduction] system" without citing any evidence that such a system would impose any extra burden. There are other procedures recognized and rejected by the District and the Union which would minimize the infringement on the fee payers, and no adequate reasons other than convenience to the District and the Union have been advanced for failing to use those less impinging systems.

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[20]Using the current October 15 notice schedule, collection of the initial fees could be delayed to the end of November. Otherwise, collection of the initial fees could start on September 30, if the notice was distributed during the first week of school to all teachers who had opted to be agency fee payers in the previous school year and all new employees who had not assumed full union membership. App. 10a n.7, 15a-16a & n.1. Under either system, an advance reduction could be achieved by either the school district deducting a different (and smaller) amount from objecting agency fee payers than for nonobjecting fee payers and union members; or, if the district deducts the same amount from all employees, the union providing objectors with a rebate check prior to the first dues-equivalent fee deduction.

> The District's deduct-escrow-refund procedure fails to protect the fee payers' constitutional rights as identified in *Hudson* * * * .

Id. at 17a-18a.

This Court has repeatedly refused to accept "administrative convenience" as a justification for contravening a constitutional mandate. "'While [the *Hudson*] procedure would likely result in some additional administrative burden to the bar and perhaps prove at times to be somewhat inconvenient, such additional burden or inconvenience is hardly sufficient to justify contravention of the constitutional mandate.'" *Keller*, 496 U.S. at 16-17 (quoting with approval *Keller v. State Bar*, 47 Cal. 3d 1152, 1192 (1989) (Kaufman, J., concurring and dissenting)); *see also Ellis*, 466 U.S. at 444; *Cleveland Bd. of Educ. v. LaFleur*, 414 U.S. 632, 647 (1974) ("administrative convenience alone is insufficient to make valid what otherwise is a violation of" individual constitutional rights).

More importantly, the "annual and fluctuating nature of elementary school employment" and all the other problematic excuses accepted by the panel majority below were present before this Court in *Hudson*, which involved the school district in Chicago and its recognized teachers' union. None of these "administrative burdens," intrinsic to elementary education, prevented this Court from specifically requiring advance reduction as part of those "carefully tailored" procedures necessary to "minimize the infringement." *Hudson*, 475 U.S. at 303-07 & n.20.

Finally, because First Amendment rights are affected, strict scrutiny mandates that the union demonstrate a compelling **state** interest,[21] not a rational **union** reason, for using the "deduction-escrow-rebate" scheme. As already established, that burden

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[21]"[C]are must be taken not to confuse the interest of partisan organizations with governmental interests." *Elrod*, 427 U.S. at 362.

cannot be met here[22], especially since the union's affiliates in other states all have the same "legitimate logistical reasons," relied upon herein—nevertheless, they provide both advance reduction and advance notice.[23] Thus, the union's "deduction-escrow-rebate" procedure "is not 'carefully tailored to minimize the infringement' on nonmembers' First Amendment rights, because for four months it deprives the fee payer of amounts that are to be refunded." App. at 15a (Brunetti, J., dissenting).

B. The Conflict Among Courts Of Appeals

The panel majority's holding that an advance reduction is not constitutionally required under *Hudson* also directly conflicts with the decisions of three other United States courts of appeals, the Third, Sixth and Seventh Circuits, as well as other panels of the Ninth Circuit. However, the panel majority's holding is supported by decisions of two other United States courts of appeals, the Fourth and Eleventh Circuits.

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[22]"Since • • • it is the government's burden to demonstrate an overriding interest in order to validate an encroachment on protected interests, the burden of establishing this justification as to any particular [objecting teacher] will rest on the [union, with] cases of doubt being resolved in favor of the particular [teacher]." *Elrod*, 427 U.S. at 368.

[23]*See Lehnert v. Ferris Faculty Ass'n*, 707 F. Supp. 1490, 1496-97 (W.D. Mich. 1989) (by November 30 the Michigan Education Association determines the amount of the "reduced fee that an objector will be required to pay" and thereafter provides to all nonunion employees notice, financial information and the opportunity to object and/or challenge the reduced fee calculation within 30 days of receipt of the notice; "[c]ollection of service fees for non-members will not begin until after the period for written objection has expired"); *Lowary v. Lexington Local Bd.*, 704 F. Supp. 1430, 1473-76 (N.D. Ohio 1987) (by December 15 the Ohio Education Association will send each nonmember an explanation of the basis for the chargeable agency fee and opportunity to object and/or challenge the fee calculation by January 15; "[t]he first deduction of the fee will not occur prior to January 15th").

In *Hohe II*, 956 F.2d at 414 (emphasis added), the **Third Circuit** correctly found that "[i]n calculating the fair share fee, a union is required to determine an appropriate **advance reduction**."[24]

Three different panels of the **Sixth Circuit** have ruled that

> *Hudson* clearly rejects the premise that a union may continue to collect a service fee equal in amount to the union dues once a non-union member has objected to such a procedure. Rather, the union must instead deduct from the service fee that amount which is undisputedly used for political or ideological functions.

Damiano, 830 F.2d at 1369; *accord Tierney II*, 917 F.2d at 937; *Tierney I*, 824 F.2d at 1502-04.[25]

In *Damiano*, 830 F.2d at 1369-70, the court explained that this "advanced reduction method is clearly a less burdensome method of accommodating non-union employees," because escrow of the part of the dues that indisputably represents **non-**chargeable expenses "would unduly deny the employee's unqualified right to his property" and "insure that the dissenting employee could not use this property for his own preferred political, ideological or other elected purposes."

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[24]*See infra* note 8. Even before *Hudson*, the Supreme Court of New Jersey had required the teacher union's "computation of the current year's representation fee for nonmembers to exclude that percentage of the union's prior year's budget attributable to expenses that the law prohibits the union to charge to nonmembers." *Boonton*, 494 A.2d at 293-94.

[25]"[T]his plan, contrary to *Hudson*, creates a forced exaction followed by rebate. The foregoing procedures violate *Hudson* because the fee in its entirety is placed in escrow, whereas under *Hudson*, as we read it, only those sums which correspond to amounts reasonably in dispute and, at the union's option, indisputably agreement-related, may be placed in escrow." *Tierney I*, 824 F.2d at 1506.

Prior to *Hudson*, another panel of the Ninth Circuit had recognized both the "use" and "**collection**" violations inherent in the forced exaction of the nonchargeable monies to the union.

> The diversion of the employees' money from use for the purposes for which it was exacted damages them doubly. Its utilization to support candidates and causes the plaintiffs oppose renders them captive to the ideas, associations and causes espoused by others. At the same time **it depletes their own funds and resources to the extent of the expropriation and renders them unable by these amounts to express their own convictions and their own ideas and to support their own causes.**

Seay, 427 F.2d at 1004 (emphasis added).[26]

In abandoning the principle of *stare decisis*, the panel majority rationalized its refusal to follow its own **Ninth Circuit** precedent because "in the two decades that the *Seay* dictum has been on the books, it has never been followed; its precedential effect has been dissipated by the Supreme Court's intervening ruling in *Hudson*." App. at 7a n.4. Nothing could be further

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[26]After *Seay*, but before *Hudson*, the Oregon Court of Appeals also required the union to "reduce the fair-share dues pro-rata in advance." *Carlson*, 700 P.2d at 268. After *Hudson*, another panel of the Ninth Circuit seemed to support the concept of advance reduction when it held that a union's "failure to institute *Hudson* procedures can serve as a justification for [a nonmember's] unilateral reduction of fees." Furthermore, it ruled that the union's "argument that [the nonmember] should have continued paying dues while seeking judicial redress is inconsistent with the Supreme Court's rejection of any type of rebate remedy." *Dean*, 924 F.2d at 809. Finally, the California Supreme Court in a student fees case has just held that "the procedures outlined in *Hudson* * * * will require the Regents to identify any groups that are ineligible for mandatory funding under the constitutional standards * * * and offer students the option of **deducting** a corresponding amount from the mandatory fee." *Smith*, 844 P.2d at 513 (citations omitted; emphasis added).

from the truth. As already noted, this Court recognized the same constitutional principle in *Elrod* and expanded it in *Hudson*,[27] while the Sixth Circuit in *Damiano* adopted the reasoning and holding of *Seay*.

On the other side of the conflict, both the Fourth and Eleventh Circuits agree with the panel majority's holding "that escrow accounts obviate the need for advance reductions." App. at 5a n.2.[28]

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[27]Circuit Judge Posner for the **Seventh Circuit** in *Hudson*, 743 F.2d at 1192, had already accepted this same constitutional axiom: "[T]he money that an objecting employee is compelled against his [or her] will to spend to support a union's political views is money not available to him [or her] to support other political activities, and this indirect effect on the marketplace of ideas is we think sufficient to require the creation of procedures that protect against such compulsion." Circuit Judge Flaum, concurring, also agreed: "The temporary use of funds for improper purposes injures [objecting nonmembers] in two ways: it causes them to subsidize ideas with which they disagree; and it depletes their funds available for supporting causes with which they agree." *Id.* at 1199. Only advance reduction, not escrow, protects against the depletion of one's available funds for supporting causes with which they agree and the indirect, but important, injury on the marketplace of ideas.

Following *Hudson*, the Indiana Court of Appeals also held that "[t]he First Amendment * * * requires the unions to provide nonmembers with an '**advance reduction of dues**,' that is, the unions must deduct from the dues charged to union members the costs of the unions' political and ideological activities unconnected with the costs of collective bargaining and contract administration **before they may collect** the sum remaining, i.e., the fair share fee, from nonmembers." *Cheeseman*, 527 N.E.2d at 718.

[28]The panel majority incorrectly cites *Hohe v. Casey*, 868 F.2d 69, 72 (3d Cir.), *cert. denied*, 493 U.S. 848 (1989) (*Hohe I*); and *Andrews v. Education Ass'n*, 829 F.2d 335, 339 (2d Cir. 1987), as holding that no advance reduction is required by *Hudson*. Neither *Andrews* nor *Hohe I* is directly on point. Advance reduction was not one of the issues determined in *Andrews*, 829 F.2d at 338-41, and the procedure there also **apparently provided** an advance reduction, *see id.* at 337-38. *Hohe I*, 868 F.2d at 70, 74 n.7, was a decision on appeal from denial of a preliminary injunction and was "not intended to intimate any opinion regarding the ultimate merits;" moreover, the procedure

In *Crawford*, 870 F.2d at 160-61, the **Fourth Circuit** noted in dictum[29] that the union's plan for the collection of agency fees from nonmembers may provide "an interest-bearing escrow account as an alternative to advance reduction."[30]

Then, as this Court knows, *see supra* pp. 9-10, a divided panel of the **Eleventh Circuit** ruled that, when using compulsory bar dues to fund its political lobbying, the bar is not required to provide an objecting member with an advance deduction for the proportion of dues that the bar knew would be used for political

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in *Hohe* **did provide** an advance reduction, *see Hohe v. Casey*, 695 F. Supp. 814, 815 (M.D. Pa. 1988), *aff'd*, 868 F.2d 69 (3d Cir.), *cert. denied*, 493 U.S. 848 (1989). Moreover, as already noted *supra* p. 21, in *Hohe II*, 956 F.2d at 414, the Third Circuit conclusively required unions to use the **advance reduction** method in calculating the agency fee. Furthermore, prior to *Hudson*, the Third Circuit had already determined that while *Railway Clerks v. Allen*, 373 U.S. 113 (1963) had "intimated strongly that * * * a refund could cure **past** improper exactions of a fee, **future** exactions should be **reduced, pro rata, prior** to collection." *Galda I*, 686 F.2d at 167 (emphasis added). This was reaffirmed in *Galda II*, 772 F.2d at 1068, where procedures still had not been established "that would allow an advance proration" of a mandatory student fee between constitutionally chargeable and nonchargeable purposes. Therefore the court held that exaction of that fee "cannot continue". *Id.*

[29]The ruling was dictum because the union's plan was "a hybrid reduction-escrow system." *Crawford*, 870 F.2d at 161.

[30]Prior to the *en banc* ruling, a panel of the Fourth Circuit held the opposite. A union "may not use a rebate approach under which it collects uniform union dues from all employees and later returns the portion unrelated to collective bargaining to nonunion employees. The union must use an approach by which amounts charged for collective bargaining services are reasonably calculated to be correct from the outset. * * * The core principle underlying all of the decisions prescribing allocation procedures is that the correct amount of a service fee to be charged nonunion employees for collective bargaining must be established, to the extent practicable, *in advance*." This "underpinning principle mandates that the union follow required procedures **in advance of assessing a fee**." *Dashiell*, 925 F.2d at 754, 756 (citations omitted; first emphasis in original; other emphasis added).

activity because "an interest-bearing escrow account (along with an otherwise satisfactory procedure) is sufficient." *Gibson*, 906 F.2d at 631.

It is clear that the courts below are in disarray on whether first amendment due process requires the advance reduction **AND** escrow of compelled fees, or whether the agents of compulsion may, for their own convenience, choose between advance reduction **OR** escrow. It is imperative that this Court grant the petition for certiorari and decisively resolve the critical questions presented by the record and decision of the Ninth Circuit herein.

III. IN ALLOWING THE *HUDSON* NOTICE TO BE GIVEN SEVERAL WEEKS AFTER, RATHER THAN BEFORE, THE DUES-EQUIVALENT FEE DEDUCTION BEGINS EACH YEAR, THE PANEL MAJORITY'S DECISION CONFLICTS WITH THIS COURT'S DECISION IN *HUDSON* AND DECISIONS OF OTHER UNITED STATES COURTS OF APPEALS

A. The Conflict With *Hudson*

In its new decision following rehearing, the panel did not discuss the district court's holding "that an agency fee plan with post-deduction notice of *Hudson* rights * * * is constitutional," other than to affirm the district court in its entirety.[31] App. at 41a. The affirmance of the district court's failure to require

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[31]However, the original panel majority had held "that notice of and adequate information concerning the agency fee must be given to all nonmembers **before** any fees may be collected from them." App. at 29a. That panel based its holding on *Hudson*'s requirement of providing nonmembers with adequate information of the basis of the reduced fee. "Advance notice must be given to protect the nonmember's first amendment interest—a fair opportunity to identify the impact of the government action on his [or her] interests and assert a meritorious first amendment claim." *Id.*, *see also Hudson*, 475 U.S. at 303, 306-07.

advance notice, however, conflicts with this Court's holding in *Hudson* and other, earlier due process cases. *Hudson* held that the "constitutional requirements for the Union's **collection** of agency fees include an adequate explanation of the basis for the fee." 475 U.S. at 310 (emphasis added). A notice first given several weeks after the first exaction of dues-equivalent fees is untimely.

In *Hudson*, this Court identified several purposes for the disclosure "of the basis for the fee," in addition to informing nonunion employees that after the initial deductions they have a right to receive a prompt impartial determination of the union's calculation of the chargeable amount. *Id.* at 307-10. Moreover, an "100% escrow does not" satisfy these additional purposes: explaining what the deductions from their wages will entail; and providing "a fair opportunity to identify the impact of the governmental action on [their] interests and to assert a meritorious First Amendment claim," *id.* at 303, 310. Since "the governmental action on [their] interests" first occurs when the public employer automatically deducts the fees, not when the union uses their money, the notices and opportunity to object must occur prior to the seizure of the nonmembers' fees.[32]

Likewise, *Hudson* established these procedural safeguards to avoid a "remedy which merely offers the dissenters the possibility of a rebate," *id.* at 305-06, 310; *accord Ellis*, 466 U.S. at 443-44, and to "minimize th[e] impingement [caused by the agency shop itself on First Amendment rights] and * * * **facilitate** a nonunion employee's **ability to protect his rights**." *Hudson* 475 U.S. at 307 n.20 (emphasis added); *see also id.* at

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[32]This mandate cannot be any clearer, and the union engages in pure sophistry when it argues, as it did in the court below, that *Hudson* permits "ex post facto" notice concerning the agency fee seizures. The lower courts, discussed *supra* note 23 and *infra* pp. 27-29, had little difficulty requiring advance notice precisely because the union's arguments and the dissent in the original *Grunwald* opinion are so contrary to the spirit and the plain meaning of *Hudson*.

302-03 & nn.11, 12. Only a notice which timely **precedes** the initial collection of any compulsory fees can satisfy all of these requirements.

Moreover, pre-deprivation notice is the usual constitutional requirement: "An essential principle of due process is that a deprivation of life, liberty, or property 'be **preceded by notice** and opportunity for hearing appropriate to the nature of the case.'" *Cleveland Bd. of Educ. v. Loudermill*, 470 U.S. 532, 542 (1985) (quoting *Mullane v. Central Hanover Bank & Trust Co.*, 339 U.S. 306, 313 (1950)) (emphasis added).

Furthermore, the notice of the taking of property "must be granted at a time when the deprivation can **still be prevented**," because "no damage award can undo the fact that the arbitrary taking that was subject to the right of procedural due process has already occurred." *Fuentes v. Shevin*, 407 U.S. 67, 81-82 (1972) (emphasis added).

B. The Conflict Among Courts Of Appeals

The panel majority's decision upholding the union's post-collection notice scheme stands in stark contrast to and conflicts with decisions of the United States court of appeals for the First, Fourth, Sixth and Ninth Circuits.[33] Prior to the panel majority's *sub silentio* "ex post facto" approach to a constitutionally required notice, the **Ninth Circuit** also had required

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[33]However, the California Court of Appeal, relying on Circuit Judge Kozinski's original dissent in *Grunwald*, did uphold the constitutionality of a "concurrent notice with escrow" provision of a state regulation, permitting public-sector unions to collect agency fees from nonmembers before providing them with the notices required by *Hudson*. *Jerabek*, 4 Cal. Rptr. 2d at 186-87.

advance notice, originally on the basis of procedural due process, then on the basis of *Hudson*.[34]

In Dashiell, the **Fourth Circuit** ruled that "the union must * * * provide[e] the employee **advance information** about the fee **to be** charged * * * [and] follow required procedures in **advance of assessing a fee**." 925 F.2d at 754, 756 (emphasis added).

Similarly, the **Sixth Circuit** held:

> *Hudson* admonishes the union to give "*potential objectors* * * * sufficient information to gauge the propriety of the union's fee," **before it collects** any fees from non-members. *Hudson* require[s] that detailed financial information concerning all major categories of union expenses * * * be * * * provided to all non-members **before** any fees may be **collected** from them.

Tierney I, 824 F.2d at 1503, 1506 (first emphasis in original, other emphasis added; citations omitted) (quoting *Hudson*, 475 U.S. at 306).

In a case involving mandatory bar dues, the **First Circuit** in *Schneider*, 917 F.2d at 634, 635 n.22, held that it is the bar association's "obligation at the outset of a dues year to categorize its activities * * * [and] provide members at the beginning of the dues year with a proposed budget that classifies activities

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[34]"Due process requires reasonable notice to parties **before** action is taken to **deprive** them of **property**." *Zmuda v. C.I.R.*, 731 F.2d 1417, 1419 (9th Cir. 1984) (emphasis added). Between the issuance of the original and rehearing decisions of the panel herein, another panel of the Ninth Circuit specifically concluded that *Hudson* required "that **before collecting fees** through an agency shop agreement, a union must adequately **explain** the basis for the fee * * * [or] the union has no right to enforce an agency shop agreement." *Dean*, 924 F.2d at 808-09 (emphasis added).

as appropriate or inappropriate for mandatory financing."[35] Even before *Hudson*, the **Third Circuit** in *Galda I*, 686 F.2d at 168 n.16, found that the beginning of deductions discourages challenges.[36]

Common sense also does not support the panel majority's position either, because the very definition of the word "notice" means "[a]ny announcement, information, or indication of some present or coming event." *See e.g.*, THE AMERICAN HERITAGE DICTIONARY 897 (new coll. ed. 1978) In this context, the "coming event" is clearly the fee seizures, not the availability of a post-seizure method to get back those fees which should never have been taken in the first place.

As already established, the union cannot meet its burden of demonstrating a compelling **state** interest for deducting dues-equivalent fees for several weeks **before** distributing the *Hudson* notice, especially since the union's affiliates in other states provide notice **before** collection of the **reduced fee amount**.[37]

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[35]*Schneider*, 917 F.2d at 634, would erroneously allow the bar to escrow the anticipated nonchargeable portion of dues, rather than provide an advance reduction as required by *Hudson, Damiano, Tierney I, Hohe II, Seay* and *Smith*. However, the objecting attorneys in *Schneider* apparently did not argue that advance reduction is required.

[36]The Third Circuit quoted and relied on the recommendation of *The Supreme Court, 1976 Term*, 91 Harv. L. Rev. 1, 198 (1977) (emphasis added), that on the basis of *Abood*, unions should be required to make a schedule of estimated yearly disbursements available for inspection "**before** collecting fees from nonunion members," because there "will thus be more assurance that inertia will not persuade a dissenter to relinquish his constitutionally protected right to freedom of association."

[37]*See supra* pp. 19-20 and note 21.

CONCLUSION

When a state compels an individual to pay a fee to a union as a condition of employment, it infringes on his or her rights of free speech and association. *Hudson*, 475 U.S. at 301-02; *Ellis*, 466 U.S. at 455. This Court confirmed in *Hudson* that "the fact that those rights are protected by the First Amendment requires that the procedure [for collection of the fee] be carefully tailored to minimize the infringement." 475 U.S. at 303.

As demonstrated above, the decision of the court of appeals' panel majority in this case ignores that general rule of First Amendment law; approves procedures which omit the important, minimum constitutional safeguards of advance reduction and advance notice explicitly mandated by *Hudson*, *Beck* and *Elrod*; and thus conflicts with both this Court's applicable decisions and decisions of most other United States courts of appeals on the same fundamental issues. Therefore, to settle the disarray among the lower courts, this Court should issue a writ of certiorari to the Ninth Circuit and set the case for plenary briefing and argument on both questions presented.

Respectfully submitted,

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August 1993

OPINION OF THE UNITED STATES

COURT OF APPEALS FOR THE

NINTH CIRCUIT

May 19, 1993

[994 F.2d 1370]

Debra J. GRUNWALD; Lewis N. Adams; Vicki S. Burdeaux; Maria Buselle, et al., Plaintiffs-Appellants,

v.

SAN BERNARDINO CITY UNIFIED SCHOOL DISTRICT; Shelby Obershaw, President, SBCUSD; Hardy L. Brown, Vice President, SBCUSD; Elisa Diaz, School Board Member, et al.; San Bernardino Teachers Association, CTA/NEA, Defendants-Appellees.

Debra J. GRUNWALD; Lewis N. Adams; Vicki S. Burdeaux; Maria Buselle, et al., Plaintiffs-Appellees,

v.

SAN BERNARDINO CITY UNIFIED SCHOOL DISTRICT; Shelby Obershaw, President, SBCUSD; Hardy L. Brown, Vice President, SBCUSD; Elisa Diaz, School Board Member, et al.; San Bernardino Teachers Association, CTA/NEA, Defendants-Appellants.

Nos. 88-6617, 88-6619

United States Court of Appeals,
Ninth Circuit.

Argued and Submitted Jan. 29, 1990.

Filed May 19, 1993.

Before: NELSON, BRUNETTI and KOZINSKI, Circuit Judges.

KOZINSKI, Circuit Judge:

In this dispute between an employee union and nonmember agency fee payers, we resolve the tension between the First Amendment's guarantee of free speech and the idiomatic truth that there's no such thing as a free lunch.

Facts

Plaintiffs are nonunion teachers employed by the San Bernardino Unified School District (the District). Even though they are not members of the San Bernardino Teachers Association (the SBTA or the union), plaintiffs must contribute to it. California law requires these payments because the SBTA and the District have an agency shop agreement under which the SBTA is the teachers' exclusive collective bargaining agent. *See* Cal. Gov't Code § 3502.5(a) (Deering 1982). As beneficiaries of collective bargaining, plaintiffs must help pay for it. To this end, $30 a month is deducted from their paychecks, which is the same as the amount paid by union members.

However, the union carries out some activities unrelated to collective bargaining, such as contributing to political candidates. Though part of the union members' $30 pays for these nonrepresentational activities, the agency fee payers[1] may not be required to support them. *Abood v. Detroit Bd. of Educ.*, 431 U.S. 209, 234-37 (1977). Therefore, agency fee payers may not be charged the same amount as union members; they must only be charged a lesser amount reflecting a pro rata portion of the union's expenditures on collective bargaining activities. In an

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[1] Nonunion teachers are called agency fee payers because they pay fees under the terms of the District's agency shop agreement. In contrast, the union teachers pay membership dues.

effort to satisfy this requirement, the District puts the amounts deducted from the paychecks of agency fee payers in an escrow account. Agency fee payers can get a refund of a portion of these amounts under a procedure set up by agreement between the District and the union. Plaintiffs challenge the constitutionality of this "deduction-escrow-refund" procedure.

The mechanics of the collection procedure are simple: One tenth of the annual union dues is deducted from every teacher's paycheck on the 30th of each month that school is in session—September through June. The union gets the deduction from the paychecks of the union members, but all of the agency fee payers' deductions are put into an independently managed interest-bearing escrow account. The fees stay in escrow until the refund procedure concludes.

The refund process is set in motion no later than October 15th. By that date, the SBTA sends notice to all nonmember contributors telling them how to obtain a rebate of funds not used for collective bargaining. Accompanying this notice is a calculation of the amount the SBTA deems chargeable to representational activities.

To obtain a refund, nonmembers must submit, no later than November 15, a letter objecting to the union's discretionary use of their fees. After they object, teachers may choose one of two routes to get their refund. They can accept the SBTA's calculation of the chargeable percentage, in which case the SBTA gives them a rebate for the entire year by December 7. Or they can dispute the union's allocation and request that the percentage be determined by arbitration. If they choose arbitration, an arbitrator chosen by the American Arbitration Association decides what portion of the total payment is chargeable to collective bargaining. The challenging fee payers and the SBTA may present evidence, orally or by affidavit, at a hearing to be held no later than December 15—a month after objections are made. The arbitrator must issue his award within 30 days of the close of the hearing, and the SBTA must pay the rebate within 20 days of the arbitrator's decision. Assuming a

hearing of roughly a week, the payment date falls sometime in mid-February.

Plaintiffs challenge these SBTA procedures under 42 U.S.C. § 1983. They claim the District may not, even temporarily, deduct from their paychecks more than what the union is entitled to receive for collective bargaining activities. Plaintiffs argue that even the temporary retention of funds not allocable to collective bargaining violates their First Amendment right against compelled speech.

Discussion

I

Plaintiffs base their argument on the now well-established principle that requiring nonmember employees to contribute to the union's ideological activities runs afoul of the First Amendment. The foundations of this idea are not new: Thomas Jefferson wrote that "to compel a man to furnish contributions of money for the propagation of [religious] opinions which he disbelieves, is sinful and tyrannical." *Abood*, 431 U.S. at 234 n.31 (1977) (quoting I. Brant, James Madison: The Nationalist 354 (1948)). As *Abood* makes clear, this reasoning applies equally to compelled political contributions. 431 U.S. at 234-35. Thus, the First Amendment protects people from having to put their money where their mouth isn't.

Recent Supreme Court opinions reaffirm the First Amendment's ban on compelled subsidies of ideological causes. *See, e.g., Keller v. State Bar*, 496 U.S. 1, 15 (1989); *Chicago Teachers Union v. Hudson*, 475 U.S. 292, 301-04 (1986). However, the Court has stated that union security agreements will not violate this prohibition, provided there are adequate protections for the First Amendment rights at stake. *Id.* at 301; *Ellis v. Brotherhood of Railway Clerks*, 466 U.S. 435, 444 (1984).

Two basic principles emerge from the cases reviewing agency shop agreements: First, nonmembers have an absolute

right not to support speech they disagree with, so the union must not, under any circumstances, be able to use their money for ideological purposes. *Abood*, 431 U.S. at 235-36 (1977); *Railway Employees' Dep't v. Hanson*, 351 U.S. 225, 238 (1956). Second, nonmembers have a further First Amendment right to a fair, prompt and effective procedure, both for identifying what sums they are required to pay and, if more than that is collected, for obtaining a refund of the excess. *Hudson*, 475 U.S. at 306-09. For convenience, we will refer to the first of these as the substantive First Amendment right and to the second as the procedural First Amendment right.

A. The Substantive First Amendment Right

The Supreme Court in *Ellis* announced a few of the basic rules for safeguarding nonmembers' substantive First Amendment right. An absolute baseline is that nonmembers may never be charged more than is needed to cover "expenditures [which] are necessarily or reasonably incurred" in collective bargaining. 466 U.S. at 448. Moreover, money collected from nonmembers may not be used, even temporarily, for ideological purposes, lest they be forced to make "an involuntary loan" which the union can use to promote its political ends. *Id.* at 444. In a passage highly relevant to our case, *Ellis* observed that, to avoid forced subsidies forbidden by the First Amendment, unions must adopt procedures "such as advance reduction of dues and/or interest-bearing escrow accounts." *Id.* Taking our lead from *Ellis*, we conclude that the District's escrow scheme poses no risk that plaintiffs' substantive free speech rights will be violated.[2]

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[2] In so holding we join the Second, Third, Fourth and Eleventh Circuits which have held that escrow accounts obviate the need for advance reductions. *See, e.g., Gibson v. The Florida Bar*, 906 F.2d 624, 631 (11th Cir. 1990), *cert. dismissed*, 112 S. Ct. 633 (1991); *Crawford v. Air Line Pilots Ass'n Int'l*, 870 F.2d 155, 161 (4th Cir. 1989); *Hohe v. Casey*, 868 F.2d 69, 72 (3rd Cir.), *cert. denied*, 493 U.S. 848 (1989); *Andrews v. Education Ass'n*, 829 F.2d 335, 339 (2nd Cir. 1987). The Sixth Circuit has held that unions must reduce nonmember fees in advance by at least the amount unquestionably dedicated to ideological expenses. *See Damiano v. Matish*, 830 F.2d 1363, 1370 (6th Cir.

All of the agency fees collected from nonmember employees go into an escrow account; this precludes any dispute about whether the amount placed in escrow is adequate. Any nonmember seeking a rebate of the $80 that would be used for nonrepresentational purposes need only advise the union in writing by November 15. Provided the employee accepts the union's apportionment, the union pays out the $24 already collected by December 7. In addition, it also pays an up-front rebate of the $56 that will be deducted from the employee's paycheck over the next seven months. An objecting employee who questions the apportionment can force the union to arbitrate the matter, with the union paying the cost of the arbitrator. The arbitration takes place in December, and the objecting employee's account is settled by sometime in mid-February. By then, the objector has contributed $40 to the escrow account. He gets the $40 back with interest, plus $40 as an advance payment of the fees that will be deducted from his paycheck during the remaining five months of the school year. In either case, none of the objectors' money is or can be used by the union for ideological purposes. To the contrary, the objector actually makes a small profit.[3] The long and short of

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1987); *Tierney v. City of Toledo*, 824 F.2d 1497, 1503 (6th Cir. 1987). As we explain in the text, we read *Hudson* as allowing the union more flexibility.

[3] Assuming an interest rate of 10%, a non-arbitrating employee loses about 25 of interest on the $24 put in escrow over the first three months. Because of the advance rebate, however, he gets what is essentially an interest free loan of $56 that he pays off through paycheck deductions over the next seven months. At the same interest rate, the rebate would be worth about $1.75 in advance interest, for a profit of roughly $1.50. The employee who goes to arbitration still makes a profit, albeit a less munificent one. Assuming the arbitrator upholds the union's calculations, by sometime in mid-February the employee receives $40 with interest, which compensates him for the lost use of the money while it was in escrow. However, he also gets an advance rebate of $40 to compensate for the $8 a month that will be deducted from his paycheck over the next five months. This advance yields an economic profit of about 80. While these sums are too small to be of practical significance, what matters is that the procedure adopted gives the objecting employee the benefit of any

it is that plaintiffs cannot establish a substantive free speech violation because none of their money is used, or ever can be used, by the union for non-representational purposes.

Plaintiffs nevertheless argue that they suffer a substantive First Amendment injury because they are denied use of their money temporarily, so they can't use it to promote First Amendment causes they support. We seriously doubt that this states a First Amendment injury at all, particularly where plaintiffs are either given an advance rebate or paid interest on their money to make up for lost use. Any other conclusion would turn every tax refund suit—indeed every monetary claim against an entity acting under color of law—into a First Amendment case.[4]

In any event, to the extent plaintiffs have suffered an injury it is of a much different character than that contemplated by *Abood*, *Ellis* and *Hudson*. Those cases categorically prohibit only one type of First Amendment harm: use of nonmembers' money to promote causes they do not believe in. The Supreme Court has recognized in those cases and others that this type of injury is particularly grave: To be forced to promote a cause or express sentiments that run contrary to one's conscience is painful in addition to being unjust. This sort of compelled contribution is forbidden under a broad First Amendment

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imprecision in the calculation process.

[4] Surprisingly, this theory is not without support in the case law. The Sixth Circuit embraced such a claim in *Damiano v. Matish*, 830 F.2d 1363, 1370 (6th Cir. 1987), and one pre-*Hudson* Ninth Circuit case seems to have considered the unavailability of funds as a factor in establishing First Amendment harm. *Seay v. McDonnell Douglas Corp.*, 427 F.2d 996, 1004 (9th Cir. 1970) (dictum). For the reasons explained in the text, we decline to follow the ill-advised ruling of the Sixth Circuit. And in the two decades that the *Seay* dictum has been on the books, it has never been followed; its precedential effect has been dissipated by the Supreme Court's intervening ruling in *Hudson*. *See Jerabek v. Public Employment Relations Bd.*, 2 Cal. App. 4th 1298, 1309, 4 Cal. Rptr. 2d 181, 187 (1992) (declining to follow *Seay* dictum for the same reason).

protection which the Court has called the "individual freedom of mind." *See Wooley v. Maynard*, 430 U.S. 705, 714 (1977) (quoting *West Virginia State Bd. of Educ. v. Barnette*, 319 U.S. 624, 637 (1943)). The agency shop agreement we test here does not inflict this type of First Amendment harm. As to other types of injury plaintiffs may suffer, *Abood*, *Ellis* and *Hudson* require only a reasonable accommodation. We consider next whether the procedure adopted by the District provides such a reasonable accommodation of plaintiffs' remaining interests.

B. The Procedural First Amendment Right

Even if nonmembers' money can't be used by the union for nonrepresentational purposes, their rights may still be infringed by a deduction-escrow-refund procedure, unless the procedure serves a legitimate purpose and is administered in a fair and impartial fashion. Requiring agency fee payers to go through the inconvenience, embarrassment and delay of recovering even a small sum—practically a sum so small it's hardly worth the hassle—is a burden they cannot be required to bear, unless there's a compelling reason for requiring it and the procedure itself is reasonable.

Hudson provides significant guidance in judging the adequacy of the procedure adopted here. Though *Hudson* noted with approval that the union had created an escrow account to hold 100% of the funds collected from dissenters, the Court commented that an "agency shop agreement itself impinges on the nonunion employees' First Amendment interests, ... because[, for example,] the nonunion employee has the burden of objection." *Hudson*, 475 U.S. at 309. In the end the *Hudson* court struck down the escrow arrangement offered as a remedy because it remained "flawed in two respects. It [did] not provide an adequate explanation for the advance reduction of dues, and it [did] not provide a reasonably prompt decision by an impartial decisionmaker." *Id.*

We interpret this language in *Hudson* as expressing a strong preference for identifying nonunion members early enough so

that the deduction-escrow-refund procedure can be avoided altogether. To employ the more cumbersome and intrusive deduction-escrow-refund procedure, the union must provide an "adequate explanation," which we interpret to mean that the union must show that the preferred method of doing things is impossible or, at any rate, far more costly or cumbersome.[5] Moreover, where a deduction-escrow-refund procedure is employed, the refund procedure must be reasonably prompt; the employee must be given sufficient information from which to judge the adequacy of the refund;[6] and, if the challenging employee so chooses, the amount of the refund must ultimately be decided by an impartial decisionmaker.

As to the first inquiry, the union has provided what we consider to be an adequate explanation for resorting to the deduction-escrow-refund procedure: Public school teachers are employed on a school year by school year basis. Virtually all new employees begin work at the same time—around September 1, when the academic year starts. During September, the District and the union first learn two pieces of information necessary to the administration of the agency shop agreement: the home addresses of all new teachers and, most importantly, the names of the teachers who choose to be agency fee payers that year. Thus, the end of September is the earliest point at which the SBTA can identify all agency fee payers and notify

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[5] The "adequate explanation" language in *Hudson* arguably relates only to the notice requirement; however, *Hudson* does "require[ ] that the procedure be carefully tailored to minimize the infringement" upon nonmembers' First Amendment rights. 475 U.S. at 303. We therefore interpret *Hudson* to require that the union give reasons for failing to provide an advance reduction.

[6] We do not address the adequacy of the notice provided by the union. *See Hudson*, 475 U.S. at 306-07. The district court found that the information gave plaintiffs adequate notice, Order Re Preliminary Injunction, ER at Tab 10, at 2, and plaintiffs do not challenge that finding on appeal.

them of their right to a refund.[7] The union, in fact, sends out a notice to agency fee payers advising them of their rights no later than October 15.

Under the circumstances it would be highly impractical for the union to separate members from nonmembers and determine the affiliations and addresses of the new teachers before the first monthly paycheck, which comes at the end of September. *See* Stipulation of the Parties at 16; Brief of Defendant-Appellee San Bernardino Teachers Association at 9 n.11. Because the procedure is reasonable in light of the annual and fluctuating nature of elementary school employment and the burden on agency fee payers is relatively slight, we hold that this is the type of "appropriately justified advance reduction" approved by the Court in *Hudson*. 475 U.S. at 309.

The scheme scrutinized here also satisfies the twin requirements that nonmembers be provided with a "reasonably prompt

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[7] It is possible, of course, to devise a more complex system that would minimize further the burden on agency fee payers. For example, the union might operate under the assumption that those teachers who opted to be agency fee payers in one year would want to continue to be agency fee payers in the next—a plausible, but not a necessary, inference. We are hard pressed to say, however, that the Constitution requires the school district and the union to bear the additional administrative burden of operating a two-tier system (one tier for continuing employees, another for new employees and those who wish to change their status). The test, after all, is not whether the union and the school district have come up with the system that imposes the least burden on agency fee payers, regardless of cost (a test no system could possibly satisfy); rather, we inquire whether the system reasonably accommodates the legitimate interests of the union, the school district and nonmember employees. Even the dissent concedes an escrow system is necessary as to some employees—new teachers and existing teachers who change from union status to agency fee payers. The narrow question dividing us is whether the district may extend that procedure to all employees in order to maintain a uniform classification system. The dissent disagrees with our assertion that a two-tier system would be more costly and cumbersome, but we think common experience supports our position.

decision by an impartial decisionmaker." *Id.* The scheme adopted here was foreshadowed in *Hudson*:

> [A] full-dress administrative hearing, with evidentiary safeguards, [need not be] part of the "constitutional minimum." Indeed, we think that an expeditious arbitration might satisfy the requirement of a reasonably prompt decision by an impartial decisionmaker, so long as the arbitrator's selection did not represent the Union's unrestricted choice.... [S]election of an arbitrator frequently does not represent one party's unrestricted choice from a list of state-approved arbitrators.

Id. at 308 n.21. Regarding the "impartial decisionmaker," providing for selection of an arbitrator by the AAA does not rise to the level of "unrestricted union choice" forbidden by *Hudson*. Other Circuits agree. *See, e.g., Ping v. National Educ. Ass'n*, 870 F.2d 1369, 1373 (7th Cir. 1989) (plan which calls for AAA selection of an arbitrator satisfies *Hudson*'s requirement); *Damiano v. Matish*, 830 F.2d 1363, 1371 (6th Cir. 1987) (same); *Andrews v. Education Ass'n*, 829 F.2d 335, 340 (2nd Cir. 1987) (same). Though some have argued that the AAA's origins reveal a pro-union undercurrent, *see Andrews*, 829 F.2d at 340, plaintiffs raise no such contention here.

The refund also appears to be reasonably prompt. If the employee does not object to the union's apportionment, his account is settled by December 7. If he does object, arbitration must begin no later than December 15, a month after the end of the objection period. The arbitrator must issue his decision within a month of the close of the proceedings. Within twenty days from the date of the decision, the union must pay back any rebatable portion of the objectors' dues. The only variable in the schedule is the length of the hearing itself. Since the issues are relatively narrow and the union bears the cost of the arbitrator as well as its own representation expenses, we have no reason to believe that the proceeding will be anything but prompt. Because the arbitration timetable is appropriately speedy, and plaintiffs do not claim that the deadlines aren't

being met, we hold that the objection process does not impermissibly impinge on plaintiffs' First Amendment rights.

II

Though individually plaintiffs have very little money at stake in this litigation, they obviously find themselves in an uncomfortable position: They are represented by a union they do not support and to which they are, nevertheless, forced to contribute a portion of their income. It adds insult to injury for them to be deprived, even temporarily, of additional funds to which they are rightfully entitled. This concern is legitimate. But the union has legitimate interests as well. Under applicable law, the union is the bargaining unit's lawful representative, and it is entitled—indeed required—to collect from everyone in the unit a pro rata portion of the funds it expends on representational activities.

Ideally, of course, the union would collect from nonmembers only that amount used for representational purposes. But that is not so easy to accomplish in practice. Here, the union has advanced a legitimate reason for the procedure it has adopted: Its ranks and the ranks of the agency fee payers change from year to year. Mindful of this fact, the union has come up with a procedure that strikes a proper balance between the union's right to charge fees for collective bargaining activities and the plaintiffs' First Amendment right to be free from forced contribution to causes with which they disagree. Tyranny of the majority this is not.

AFFIRMED

BRUNETTI, Circuit Judge, dissenting.

The only issue before us in this case is the constitutionality of the "deduction-escrow-refund" procedure used by the District and the Union to collect agency fees from the nonunion teachers, the agency fee payers. The precise question is whether the District can deduct the full union dues from agency fee

payers' paychecks in September and not pay a rebate to the objecting fee payers until December 7 at the earliest. To state it another way, can the District deduct nonchargeable amounts from fee payers' paychecks and hold them in escrow for four months?

As the majority notes, a union may satisfy the requirements of the First Amendment by adopting procedures "such as advance reduction of dues and/or interest-bearing escrow accounts." *Ellis v. Brotherhood of Ry. Clerks*, 466 U.S. 435, 444 (1984). However, *Ellis* did not set forth the standards that reviewing courts should apply to decide when the use of such procedures is justified.

In *Chicago Teachers Union v. Hudson*, 475 U.S. 292 (1986), the Supreme Court addressed the first of these options, advance reduction of dues, and identified three conditions that an advance reduction procedure must satisfy. First, it must provide nonmembers with an "adequate explanation" of the basis for calculating the agency fee so that potential objectors have the means to determine whether that fee is in fact fairly calculated. *Id.* at 310. Second, if a nonmember objects to the calculation, the procedure must provide "a reasonably prompt opportunity to challenge the amount of the fee before an impartial decisionmaker." *Id.* Finally, the procedure must provide "an escrow for the amounts reasonably in dispute while such challenges are pending." *Id.*

The procedure at issue here, however, is not "an advance reduction of dues" (the first *Ellis* option), but rather an "interest-bearing escrow account" (the second *Ellis* option). The District deducts from the fee payers' paychecks the full amount of union dues; it does not provide for an "advance reduction" as did the teachers' union in *Hudson*. For this reason, the majority's statement that "this is the type of appropriately justified advance reduction approved by the Court in *Hudson*" is erroneous. We therefore cannot directly apply the *Hudson* criteria to this procedure. Because the Supreme Court has not set forth the standards that reviewing courts should use to judge

the validity of *Ellis* interest-bearing escrow accounts, we must do so ourselves.

The majority opinion sets forth a two-pronged test. First, the Union must provide an "adequate explanation" for using the deduction-escrow-refund procedure: "The union must show that the preferred method of doing things is impossible or, at any rate, far most costly or cumbersome." The majority notes in n.5 that this "preferred method" is the "advance reduction" procedure itself, because this procedure is less of an infringement on nonmembers' First Amendment rights. If the Union satisfies the "adequate explanation" requirement, it must then make its procedure as fair and rapid as possible by satisfying the conditions that *Hudson* imposes on advance reduction plans. I agree with the second prong, but I disagree with the majority's statement and application of the first prong.

The issue involved has been defined by the court in *Abood*, that nonunion employees do have a constitutional right to prevent the Union's spending a part of their required service fees to contribute to political candidates and to express political views unrelated to its duties as exclusive bargaining representative. *Hudson*, 475 U.S. at 302. The objective in devising a procedure for collecting the appropriate amount from nonunion employees must be to devise a way of preventing compulsory subsidization of ideological activity by employees who object, without restricting the Union's ability to require every employee to contribute the cost of collective-bargaining activities. *Id.* 302.

The "agency shop" is already a "significant impingement" on employees' constitutional rights. *Ellis*, 466 U.S. at 455. The First Amendment requires that the fee collection procedure be carefully tailored to minimize further infringement on agency fee payers' rights, and the nonunion employee whose First Amendment rights are affected must have a fair opportunity to identify the impact of government action on his interests and to assert a meritorious First Amendment claim. *Hudson*, 475 U.S. at 303. The District and the Union accordingly have a responsibility to provide procedures that minimize the impingement and that

facilitate a nonunion employee's ability to protect his rights. *Id.* at 307, n.20. Advance reduction of dues and/or interest-bearing escrow accounts are acceptable procedures. *Id.* at 304.

As to the second prong, the procedure adopted by the District and the Union meets the *Hudson* tests because the notice given on October 15 gives the fee payers an adequate explanation of the basis for the Union calculation of the fee and the arbitration procedure provides a prompt and fair opportunity to challenge the calculation before an independent decision-maker. Where the procedure fails is that it is not "carefully tailored to minimize the infringement" on nonmembers' First Amendment rights, because for four months it deprives the fee payer of amounts that are to be refunded. The District and the Union fail to justify their failure to use procedures which they have already tried or considered which impinge less on the fee payers' rights.[1] In fact, the procedure as adopted is obviously for the convenience of the District and the Union with no consideration of the infringement on the fee payers' rights.

The majority asserts that "the end of September is the earliest point at which the [Union] can identify agency fee

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[1] The District and Union developed this deduct-escrow- refund procedure after trying and rejecting an advance reduction of dues system, and considering and rejecting a system using an October 15 notice and delay in collection of the fee until the end of December. *See Stipulation of the Parties* at 16-17.

The advance reduction system was dropped as unworkable because several school districts refused to deduct a different amount for agency fees than for member dues, and, further, the reduced fee would require *Hudson* notices at least thirty days prior to the first deduction so that the identity of the objecting fee payers could be identified. *Id.* at 17.

The delayed collection option was not adopted because it would deprive the unions and affiliated locals of any agency fees for four months each year and, in addition, fee payers would have to pay a much larger amount each month for the rest of the school year to recoup amounts owed for the four months when deduction did not take place. The Union was concerned that this unequal deduction (compared with union members fees deducted over ten months) might raise equal protection claims. *Id.* at 17-18.

payers and notify them of their right to a refund," and that therefore it would be impossible or at least highly impractical to reduce nonmembers' dues in advance. The majority also notes in n.7 that the Union could further minimize the burden on agency fee payers by assuming that "those teachers who opted to be agency fee payers in one year would want to continue to be agency fee payers in the next," but that the Constitution does not require the Union to take on the burden of doing so.

However, the evidence indicates that the Union already operates under this assumption, and that therefore it cannot provide an "adequate explanation" for failing to use an advance reduction procedure. The Union knows at the beginning of each school year who the existing agency fee payers are; it just doesn't know which of the new teachers will decide to join their ranks. *See* Stipulation of the Parties at 16 ("new teachers are typically given 30 days to decide whether to join the Union or become a fee payer.") (emphasis added). The Union assumes that existing fee payers will continue to desire that status. *See* Exhibit 9 to Stipulation at 166 ("[a]t the beginning of the fiscal year, CTA shall place into an independently-managed interest-bearing account all CTA and NEA agency fees received from fee payers.") (emphasis added); Exhibit 10 to Stipulation at 168 ("[f]rom the start of this school year, CTA has been placing all CTA and NEA agency fees received into an interest-bearing escrow account.") (emphasis added). Clearly, then, the Union could use an "advance reduction" procedure for existing fee payers and a deduction-escrow-refund type procedure for new teachers who later choose to become agency fee payers.

The Union proffers several reasons for its refusal to use such a system. First, it states that it doesn't know teachers' new addresses until the end of September. This would not hamper the operation of the two-tier procedure, because the Union doesn't need to know addresses to reduce the deduction from the agency fee payers' paychecks.

Second, the Union states that such a procedure would be problematic because several school districts have in the past

refused to deduct a different amount for agency fees than for agency dues. However, this refusal alone cannot satisfy the "adequate explanation" test. This is like the District refusing to follow *Brown v. Board of Education*, 349 U.S. 294 (1955), because integration imposes too much of an administrative burden.

Third, the Union claims that the use of a two-tier system would require that *Huason* notices be sent at least thirty days prior to the first deduction so that the identities of the objecting fee payers could be determined. Not so. While the *Hudson* notices would be required to determine which fee payers objected to the Union's calculation of the advance reduction, they would not be required to calculate the advance reduction and apply it to existing fee payers' paychecks. Operating the two-tier procedure would require only that *Hudson* notices be sent out at the same time they are now.

Fourth, the Union states that the "only other option" would be to send out the notices on October 15 and delay collection of the fee until December. Again, not so. Collection of the appropriately reduced fee could begin immediately as the parties have stipulated to what the October 15 notice is to contain including the estimated chargeable and estimated nonchargeable expenditures of the Union. *See* Stipulation of the Parties at 3. Furthermore, the Union is already "deprived" of the agency fees for four months of each year (because the fees go straight into escrow and do not come out until rebates are paid), so the argument that a two-tier system would cause such an effect does not hold water.

In sum, the Union has not justified its failure to use such a procedure. The majority baldly asserts that "the Constitution [does not] require[ ] the school district and the Union to bear the additional administrative burden of operating a two-tier system" without citing any evidence that such a system would impose any extra burden. There are other procedures recognized and rejected by the District and the Union which would minimize the infringement on the fee payers, and no adequate

reasons other than convenience to the District and the Union have been advanced for failing to use those less impinging systems.

The District's deduct-escrow-refund procedure fails to protect the fee payers' constitutional rights as identified in *Hudson*, and the district court's decision finding the plan constitutional should be reversed.

ORDER OF THE UNITED STATES

COURT OF APPEALS FOR THE

NINTH CIRCUIT

June 9, 1992

[965 F.2d 804]
Debra J. GRUNWALD, et al.,
Plaintiffs-Appellants,

v.

SAN BERNARDINO CITY UNIFIED SCHOOL DISTRICT, et al., Defendants-Appellees.

Debra J. GRUNWALD, et al.,
Plaintiffs-Appellees,

v.

SAN BERNARDINO TEACHERS ASSOCIATION, CTA/NEA,
Defendant-Appellant.

Nos. 88-6617, 88-6619.

United States Court of Appeals,
Ninth Circuit.

June 9, 1992.

Before: D.W. NELSON, BRUNETTI and KOZINSKI, Circuit Judges.

ORDER

Judges Nelson and Kozinski voted to grant the petition for rehearing and to reject the suggestion for rehearing en banc. Judge Brunetti voted to deny the petition for rehearing and to reject the suggestion for rehearing en banc. The petition for rehearing is GRANTED and the suggestion for rehearing en banc is REJECTED.

The opinion, filed October 31, 1990, 917 F.2d 1223, is hereby WITHDRAWN. A new opinion will be filed.

OPINION OF THE UNITED STATES

COURT OF APPEALS FOR THE

NINTH CIRCUIT

October 31, 1990

[917 F.2d 1223]

Debra J. GRUNWALD; Lewis N. Adams; Vicki S. Burdeaux; Maria Buselle, et alii, Plaintiffs-Appellants,

v.

SAN BERNARDINO CITY UNIFIED SCHOOL DISTRICT; Shelby Obershaw, President, SBCUSD; Hardy L. Brown, Vice President, SBCUSD; Elisa Diaz, School Board Member, et alii; San Bernardino Teachers Association, CTA/NEA, Defendants-Appellees.

Debra J. GRUNWALD; Lewis N. Adams; Vicki S. Burdeaux; Maria Buselle, et alii, Plaintiffs-Appellees,

v.

SAN BERNARDINO TEACHERS ASSOCIATION, CTA/NEA, Defendant-Appellant.

United States Court of Appeals, Ninth Circuit.

Argued and Submitted Jan. 29, 1990.

Decided Oct. 31, 1990.

* * * *

[1224]Before NELSON, BRUNETTI and KOZINSKI, Circuit Judges.

BRUNETTI, Circuit Judge:

Debra Grunwald and 48 other non-union teachers ("teachers") filed suit in the district court under 42 U.S.C. § 1983 alleging that the procedure by which the San Bernardino Teachers Association ("SBTA") and the San Bernardino City Unified School District ("the District") collected agency shop fees violated their first and fourteenth amendment rights. The district court entered a permanent injunction upholding the method of the collection of agency shop fees as constitutional. The court also ordered the District to provide rebates to teachers who had not formally objected to the fees. The teachers appeal the district court's failure to enjoin the collection of the fees, and SBTA cross-appeals the district court's order to pay rebates to the teachers.

[1225]*FACTS AND PROCEEDINGS BELOW*

Plaintiffs-teachers are employed by the defendant San Bernardino City Unified School District. They are not members of the defendant San Bernardino Teachers Association, the exclusive collective bargaining representative for teachers in the District.

SBTA and the District have an agency shop agreement. An agency shop agreement requires non-union members to pay a fee to the union for acting as their bargaining representative. Teachers who choose not to join the SBTA are required to pay an agency fee to the SBTA in order to offset their pro rata share of the costs of representation. These agency fees are deducted by the District on a 10-month basis, corresponding to the 10-month school year during which teachers are paid, with the first deduction occurring on September 30 and the last on June 30. Initially, each deduction made by the District is in the amount of one-tenth of the annual membership dues. If a nonmember objects to the amount of the fee, he/she eventually pays a reduced fee that excludes the portion attributable to matters unrelated to collective bargaining expenses.

The teachers concede that agency fee arrangements can be constitutional, but argue that the procedures for collecting the

fee and amount of the fee violate their constitutional rights. The SBTA procedure provides that from the start of the year, all agency fees will be placed into an independently managed interest-bearing escrow account.[1] By October 15, a notice is sent to all fee payers. The notice advises them of their right to receive a rebate for the portion of the fee that is not attributable to collective bargaining expenses and explains how a fee payer requests a rebate. The objection procedure requires the teacher to send a letter to the California Teacher's Association's Membership Accounting Department. The notice also provides the SBTA's calculation of the percentage of dues that the SBTA believes to be "chargeable," with detailed back-up material.[2]

The notice explains that from the start of the school year the SBTA will place all agency fees received into escrow, but that an individual's fees will be released from escrow if he or she does not submit an objection by November 15. If the individual does object, he or she may either (i) accept the SBTA's calculation of the chargeable percentage, in which case a rebate is issued by December 7 for the entire year; or (ii) request the opportunity to have the amount of the fee determined in arbitration before a neutral decisionmaker, in which case a rebate check is not sent until after receipt of the arbitrator's decision.

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[1] The description that follows is of the procedure in effect for the 1987-88 school year. [Stipulation, Ex. 9] Plaintiffs' lawsuit dealt with the 1986-87 year as well as 1987-88, but the parties agreed that for purposes of determining whether a permanent injunction should be entered, the relevant procedure to be considered was that for 1987-88. [RT 62, page 15] No issue is presented on appeal regarding the 1986-87 procedure, other than whether the district court was correct in treating the filing of the lawsuit as a proper substitute for the filing of objections under the SBTA's procedure.

[2] The district court specifically found that the information provided in the notice is adequate [CR 10, p. 2 ER], and plaintiffs do not contend otherwise.

Under the SBTA's procedure, in 1987-88 those fee payers who objected to paying the full fee but who accepted the SBTA's determination of the chargeable portion received their rebate by early December. At that point they had only paid three-tenths of the total annual agency fee (via deductions at the end of September, October and November). They were issued rebate checks in the amount of the non-chargeable portion of the entire year's fee. The fees received from those objectors who did not accept the SBTA's determination of the chargeable amount remained in escrow until the dispute could be resolved through arbitration, which took place on January 11 through 16, 1988. Objectors received rebate checks for the entire year before the April 30 fee deduction.

Under the agency fee agreement, the SBTA requested payment from non-union teachers in February, March and April of [1226]1987. Plaintiffs-teachers requested no deduction be made. Deductions were to begin in May of 1987. The teachers filed this § 1983 suit in May, requesting a temporary injunction against the collection of the fees and damages. The district court refused to enjoin the collection of fees but issued a temporary restraining order requiring the SBTA to place all agency fees collected in an escrow account.

In June, the district court issued a preliminary injunction ordering the SBTA to place the fees in an escrow account. The court found that the SBTA's procedures in collecting the agency fees, which included giving no advance notice of the deduction and initially deducting fees equal to 100% of union dues, were constitutional. In July, both parties waived a full trial. The teachers filed a motion for a permanent injunction. The court, in looking at the 1987-88 fee deductions and rebate procedures, again refused to enjoin the collection of the fees. It found the SBTA's procedures were constitutional.[3] The court also

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[3] The court did order the SBTA to include language in its procedural notice that said the union bears the burden of proof on the issue of what percentage of fees is chargeable to collective bargaining. This part of the

ordered the SBTA to pay a rebate to the teachers who filed the complaint because the court found the complaint substantially complied with the formal objection procedures required by the SBTA.

The teachers appeal the denial of the injunction, claiming the SBTA's collection procedures are unconstitutional. The SBTA cross-appeals the order to pay rebates. The District joins in the SBTA's arguments against rebates.[4] We reverse in part and affirm in part.

STANDARD OF REVIEW

A district court's conclusions on questions of law that implicate constitutional rights are reviewed de novo. *Wood v. Sunn*, 865 F.2d 982, 986 (9th Cir.1988).

DISCUSSION

I. Constitutionality of Fee Collection Procedure

The teachers argue that the District's procedure for the collection of agency shop fees violates their first and fourteenth amendment rights because the procedure by which SBTA collects the nonmember fees does not satisfy the requirements set out by the Supreme Court in *Chicago Teachers Union v. Hudson*, 475 U.S. 292, 106 S.Ct. 1066, 89 L.Ed.2d 232 (1986). Specifically, the teachers argue the deduction procedure violates their constitutional rights because the fee deducted is equal to

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court's judgment was not contested.

[4] The District also seeks enforcement of an indemnity agreement between SBTA and the District. The District did not cross-claim against the SBTA for indemnity below. Generally, we will not consider issues raised for the first time on appeal. *In re Wind Power Systems, Inc.*, 841 F.2d 288, 290 n. 1 (9th Cir. 1988). Therefore, we will not address the merits of the District's arguments regarding the indemnity agreement.

100% of members' dues and no notice is given before the deductions occur.

The district court ruled the agency fee procedure was constitutional. The court held that *Hudson* does not require advance reductions in the amount of fees collected because the 100% escrow of all nonmember funds until the proportion of chargeable expenditures is determined satisfies the constitutional requirement that nonmember fees not be used for ideological purposes by the SBTA. The court also found that no advance notice of the agency fee deductions was required to satisfy *Hudson*.

The Supreme Court has recognized that a union representing public employees has a right to require nonunion employees to contribute to the union's cost of collective bargaining as a condition of employment. *Chicago Teachers Union v. Hudson*, 475 U.S. 292, 301, 106 S.Ct. 1066, 1073, 89 L.Ed.2d 232 (1986); *Abood v. Detroit Bd. of Educ.*, 431 U.S. 209, 232, 97 S.Ct. 1782, 1798, 52 L.Ed.2d 261 (1977). In *Hudson*, the Court acknowledged that the collection and expenditure of union fees implicate nonunion employees' first amendment rights, both by forced subsidization of ideological views and by interference with the [1227]freedom of association.[5] *Hudson*, 475 U.S. at 301, 106 S.Ct. at 1073. In striking a balance between the union's and the nonunion employees' rights, "'the objective must be to devise a way of preventing compulsory subsidization of ideological activity by employees who object thereto without restricting the Union's ability to require every employee to contribute to the

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[5] Plaintiffs argue that their case also implicates the fourteenth amendment and due process. The Supreme Court, however, analyzes agency fee procedures in terms of the first amendment. *Hudson*, 475 U.S. at 304 n. 13, 106 S.Ct. at 1074 n. 13. "We are convinced that ... the procedures required by the First Amendment also provide the protections necessary for any deprivation of property." *Id.*

cost of collective bargaining activities.'" *Id.* at 302, 106 S.Ct. at 1073 (citations omitted).

The Court found that certain procedural safeguards must be incorporated into the collection procedure to achieve this objective and identified three procedural requirements a plan must meet in order to protect the nonunion members' constitutional interests. First, the procedure must avoid the risk that nonunion members fees will be used, even temporarily, to finance ideological activities unrelated to collective bargaining. *Id.* at 305, 309, 106 S.Ct. at 1075, 1077. Second, the plan must also provide nonmembers adequate information of the basis for the calculation of the proportionate fee. *Id.* at 306, 106 S.Ct. at 1075. Lastly, the nonmembers must be given a reasonably prompt opportunity to challenge the amount before an impartial decision maker. *Id.* at 307, 106 S.Ct. at 1076.

The teachers contend that the SBTA's procedure is unconstitutional because it fails to satisfy two of the procedural requirements set out in *Hudson*. The teachers argue the procedure fails to satisfy the first prong of *Hudson* because SBTA does not give advance reductions in fees, and that the plan fails to fulfill the second *Hudson* requirement because notice is not given before any deductions are made.

A. *Advance Reduction.*

The teachers first argue that SBTA's failure to reduce the agency fee assessed by an amount equal to the percentage of funds not attributable to collective bargaining activities violates *Hudson*, even though the SBTA procedure does escrow 100% of the fees paid by nonmembers until the period for objection has passed.

The circuits differ over whether the advance reduction of fees is required by *Hudson* when the union escrows the fees. Compare *Tierney v. City of Toledo*, 824 F.2d 1497, 1502-03 (6th Cir.1987) (advance reduction required), with *Crawford v. Airline Pilots Ass'n Int'l*, 870 F.2d 155, 161 (4th Cir.1989) (no advance

reduction required if fees escrowed), *Hohe v. Casey*, 868 F.2d 69, 72 (3rd Cir.1989) (no advance reduction required if fees escrowed), *Andrews v. Education Ass'n of Cheshire*, 829 F.2d 335, 339 (2d Cir.1987) (100% escrow satisfies *Hudson*), and *Gibson v. The Florida Bar*, 906 F.2d 624 (11th Cir.1990) (no advance reduction necessary).

In *Tierney*, the Sixth Circuit found advance reductions were required to satisfy *Hudson*'s first procedural requirement that the union procedure for collecting agency shop fees from nonunion members must avoid the risk that nonmembers' funds may be used temporarily for an improper purpose. *Tierney*, 824 F.2d at 1502. The *Tierney* court held that *Hudson* does not allow the union to compel a nonunion employee to contribute any sum, even if placed in escrow, which unquestionably represents ideological expenses of the Union, and stated that "the Supreme Court's approval of 100% escrow as satisfying *Hudson*'s first requirement refers to escrowing 100% of the remaining, non-clearly ideological proportion of the fee which the union may collect." *Id.* at 1504. Therefore, they concluded a union must reduce the amount of fees collected by the amount of its ideological expenditures before it collects the agency shop fee—an advance reduction. *Id.* at 1502-03.

We agree with *Tierney* and hold that advance reductions of agency shop fees are required by *Hudson* even where **[1228]** the agency fee procedure includes an escrow of 100% of the collected agency fees.[6] Because the collection of agency shop

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[6] The circuits that have disagreed with *Tierney* and permitted 100% escrow of fees have done so largely in reliance on *Hudson*'s language which holds that among the "constitutional requirements for the Union's collection of agency fees" is "an escrow for the amounts reasonably in dispute while such challenges are pending." *Hudson*, 475 U.S. at 310, 106 S.Ct. at 1077. This was never meant to imply either that 100% of fees could be escrowed absent adequate procedural safeguards or that funds clearly marked for use on representational activities are required to be escrowed. Instead, the *Hudson* court's language merely indicates that any amount "reasonably in dispute," i.e., that portion of an agency fee which is neither clearly to be used for representational purposes

fees infringes nonunion employees' First Amendment rights, the procedure for the collection of the fees must be carefully tailored to minimize the infringement. *Hudson*, 475 U.S. at 303, 106 S.Ct. at 1074. In order to be carefully tailored, the union must deduct only the amount it is entitled to, i.e. the amount arguably related to its collective bargaining expenses.

The SBTA's procedure is not carefully tailored to minimize any infringement. The SBTA collects an agency fee equal to 100% of the union dues, thereby collecting more than they are entitled to since only some of the dues are attributable to collective bargaining expenses.[7] The SBTA can only deduct a reasonable estimate of the percentage of fees attributable to collective bargaining. Thus, the SBTA must first determine the percentage of union expenses spent on activities unrelated to collective bargaining and then calculate the advance reduction from the nonmembers' dues before it can make any deductions.

An agency fee collection procedure must include advance reductions and because SBTA's procedure does not provide for advance reductions, it is constitutionally infirm.

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nor for prohibited ideological activities, must be placed in escrow. *See id.* at 309-10, 106 S.Ct. at 1077.

[7] The dissent contends that the disputed dues only amount to eight dollars per month and therefore the entire dispute does not belong in the courts. The money at stake in *Hudson* was seventeen dollars a month. Denying teachers here an opportunity to challenge the union's actions in court simply because their claim involves nine dollars less than the *Hudson* teachers' would improperly place a pricetag on constitutional rights. The *Hudson* court specifically decried such an approach, stating that "[t]he amount at stake for each individual [should] not diminish ..." any constitutional concerns. 475 U.S. at 305, 106 S.Ct. at 1075.

Nor should the teachers be denied their day in court because their claims arise from their political differences with the union, as the dissent also contends. The teachers' claims may have political undertones, but this is true of many first amendment claims which the courts continually hear.

B. *Notice.*

Plaintiffs also argue that the SBTA's plan is unconstitutional because notice is not given in advance of the first deduction of fees from the teachers' pay checks as required by the second prong of *Hudson*. The district court rejected this argument because it found *Hudson* did not require advance notice.

Tierney required unions to give notice before any fees are deducted in order to fulfill *Hudson*'s second requirement of providing nonmembers with adequate information to contest the fee. *Tierney*, 824 F.2d 1497 at 1503 (6th Cir.1987). Advance notice must be given to protect the nonmember's first amendment interest—a fair opportunity to identify the impact of the government action on his interests and assert a meritorious first amendment claim. *Tierney*, 824 F.2d at 1503.

We agree with *Tierney* and hold that notice of and adequate information concerning the agency fee must be given to all nonmembers *before* any fees may be collected from them. *Id.* at 1503. *Hudson* requires the union to give "*potential* objectors ... sufficient information to gauge the propriety of the union's fee." *Hudson*, 475 U.S. at 306, 106 S.Ct. at 1075 (emphasis added). If the SBTA must notify "potential" objectors by sending out notice of the agency fee before the first deduction is made, then the failure of the SBTA's procedure to give advance notice of the agency fee deduction renders the plan unconstitutional.

[1229]II. Rebates to Teachers Who Did Not Comply With Objection Procedure

SBTA's agency fee collection procedure sets out specific steps for objecting fee payers to follow to receive a rebate. The procedure requires a fee payer to send a letter to the SBTA indicating that the fee payer objects to his fee being spent on nonchargeable activities and requesting a rebate. The Union argues the teachers failed to comply with the objection procedure and are thus not entitled to rebates.

The teachers in this case did not send an objection letter to the SBTA. Instead, they filed suit on May 27, 1987, one day before the SBTA sent out its *Hudson* notices that outlined the right to object. The district court found that the teachers had substantially complied with the notice requirement for objections because plaintiffs' complaint objected to the agency fee collection procedure as unconstitutional. We agree. The court ordered the SBTA to pay rebates to all plaintiffs for the 1986-87 school year.

The Supreme Court has clearly held that the nonunion employee has the burden of raising an objection. *Hudson*, 475 U.S. at 306, 106 S.Ct. at 1075. "The nonmember's 'burden' is simply the obligation to make his objection known." *Id.* at 306 n. 16, 106 S.Ct. at 1076 n. 16. Prior to *Hudson*, in *Brotherhood of Railway & Steamship Clerks v. Allen*, 373 U.S. 113, 119, 83 S.Ct. 1158, 1162, 10 L.Ed.2d 235 (1963), employees opposed to the use of union security fees did not object to the union but filed suit instead. The Supreme Court found that the complaint served as a sufficient notice of objection. *Id.* at 119, n. 6, 83 S.Ct. at 1162, n. 6. In *Abood v. Detroit Board of Education*, 431 U.S. 209, 241, 97 S.Ct. 1782, 1802, 52 L.Ed.2d 261 (1977), the Supreme Court again found that sufficient notice of objection was given by the nonunion employees' complaint, which alleged that they were opposed to the union's use of fees for causes unrelated to collective bargaining.

While both *Allen* and *Abood* involved disputes where the unions did not have objection procedures in place at the time the lawsuits were filed, in *Hudson* the Supreme Court appeared to endorse a complaint as providing adequate notice despite the fact that the union did have an objection procedure. In *Hudson*, the union had an objection procedure established at the time the nonmember employees filed their lawsuit. *Hudson*, 475 U.S. at 296, 106 S.Ct. at 1070. There were seven plaintiffs in the case, three of whom did not file a formal objection according to the procedure. *Id.* at 297, 106 S.Ct. at 1071. The Court found the union's procedure unconstitutional and remanded the case to the district court to determine an adequate remedy for all the

plaintiffs, not just the four who formally objected. *Id.* at 310, 106 S.Ct. at 1077. Thus, a complaint may provide sufficient notice of objection.

In this case, the teacher's complaint challenged the constitutionality of the SBTA's plan, giving the SBTA sufficient notice of their objection to the collection of fees.

III. Attorney's Fees

The teachers request attorney's fees. 42 U.S.C. § 1988 authorizes the court to award attorney's fees to prevailing parties who bring suit under one of several statutes, including 42 U.S.C. § 1983. The Supreme Court defined "prevailing party" in *Hensley v. Eckerhart*, 461 U.S. 424, 103 S.Ct. 1933, 76 L.Ed.2d 40 (1983). "Plaintiffs may be considered 'prevailing parties' for attorney's fees purposes if they succeed on any significant issue in litigation which achieves some of the benefit the parties sought in bringing suit." *Id.* at 433, 103 S.Ct. at 1939. The teachers in this case are prevailing parties as they succeeded in having the SBTA's procedure declared unconstitutional. Thus, they are entitled to attorney's fees in an amount to be determined by the district court on remand.

CONCLUSION

The district court's award of rebates to the plaintiffs for the 1986-87 school year is affirmed. The SBTA's procedure for collection of agency shop fees fails to protect the nonmembers' constitutional rights as identified in *Hudson*. Therefore, we reverse the district court's decision finding **[1230]**the plan constitutional and remand for the entry of an appropriate injunction against the collection of agency shop fees until such time as the SBTA changes its procedure regarding advance reductions and advance notice. Further, the plaintiffs are entitled to attorney's fees in an amount to be determined by the district court.

AFFIRMED IN PART, REVERSED IN PART AND REMANDED.

KOZINSKI, Circuit Judge, dissenting in part:*

This case is about $8 a month in union agency fees. And it's not even about *who* gets the $8—everybody agrees that plaintiffs are entitled to the money—but about the precise timing and procedure for the rebate. It is over such a trifle—such a *bagatelle*, as the French would call it—that this lawsuit is brought, with all the attendant costs and burdens of modern litigation. At bottom, this is a protest action by certain teachers against a union to which they do not belong but to which they are forced to contribute financially. Their frustration is understandable, but they have chosen the wrong forum for resolving what is essentially a political dispute.

I

I start with the proposition that, pursuant to state and federal labor laws, the union performs legitimate and important functions in its capacity as exclusive bargaining representative for teachers employed by the San Bernardino City Unified School District. That plaintiffs choose not to join the union makes no difference; they are deemed, by law, to receive substantial benefits from the union's representational activities, and they are required to contribute an agency fee to pay for these benefits. At issue here is only a small portion of the agency fee—about $8 per month—which the union spends on nonrepresentational activities. Everyone agrees that the union may not use plaintiffs' money for those purposes.

And it doesn't. All of the agency fees collected from nonmember employees are put into an independently controlled

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* I join part II of the majority opinion, which holds that the teachers' filing of the complaint provided sufficient notice of their objection to the collection of fees.

escrow. If a nonmember wishes to retain amounts earmarked for nonrepresentational purposes, he need only advise the union in writing by November 15. By early December, the union pays out the $24 already collected, together with an up-front rebate of the $56 that will be collected over the next seven months, provided the employee accepts the union's apportionment. An employee who challenges the apportionment can force the union to arbitrate the matter. The arbitration takes place in January and the objecting employee's account is settled before April 30. By that time the objector will have contributed $56 into escrow, which he gets back with interest, along with $24 up front to cover the remaining three months of the school year. In either case, the objector makes a small profit.[1]

Precedent joins common sense. The Supreme Court in *Chicago Teachers Union, Local No. 1 v. Hudson*, 475 U.S. 292, 106 S.Ct. 1066, 89 L.Ed.2d 232 (1986), listed three—and only three—requirements a union must meet in a situation such as this. First, none of the money collected from the objectors may be used—even temporarily—for nonrepresentational purposes. *Id.* at 305, 106 S.Ct. at 1075. Citing *Abood v. Detroit Board of Education*, 431 U.S. 209, 234 n. 31, 97 S.Ct. 1782, 1799 n. 31, 52 **[1231]**L.Ed.2d 261 (1977), the Court decried the "tyrannical character of forcing an individual to contribute even 'three pence' for the 'propagation of opinions which he disbelieves.'" 475 U.S. at 305, 106 S.Ct. at 1075. Here, the union uses not a penny for nonrepresentational activities, as 100% of the agency

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[1] Assuming an interest rate of 10%, a non-arbitrating employee would lose about 20¢ of interest on the $24 held in escrow for the first three months. Because of the advance rebate, however, he would get the $56 before he would have earned it as salary. At the same interest rate, the rebate would be worth about $1.80 in advance interest, for a cool $1.60 of profit.

The employee who goes to arbitration still makes a profit, albeit a less munificent one. Assuming the arbitrator upholds the union's calculations, the employee would receive $56 with interest, which would compensate him for the lost use of the money. He would, however, get an up-front rebate of $24, which would be worth about 20¢ in advance interest. Not exactly a killing, but better than nothing.

fee is safely tucked away in escrow. Thus, objecting employees do not suffer the injustice of having their money used to advance causes they abhor.[2]

The only other first amendment harm plaintiffs suggest is that the $8 a month is not available to *them* for three (or seven) months, so they are unable to use the money to exercise *their* first amendment rights. Appellant's brief at 25-26. If this argument were accepted, every suit for money against a party acting under color of government authority would automatically become a first amendment case. In any event, it is a type of harm that the Court in *Hudson* did not recognize.[3]

Second, *Hudson* requires that the union provide objecting employees with "sufficient information to gauge the propriety of the union's fee." *Id.* 475 U.S. at 306, 106 S.Ct. at 1075. The union does this, as the district court found and the plaintiffs seem to concede. Maj. op. at 1225 n. 2.

Hudson's third requirement is that an impartial arbitrator be available to make a prompt decision as to what portion of the

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[2] In fact, the union goes well beyond what the Supreme Court requires; under *Hudson*, the union need not give up control over the entire agency fee, only the portion that might reasonably be questioned by an objecting employee. 475 U.S. at 310, 106 S.Ct. at 1077. By putting the entire agency fee into escrow, the union eliminates any quibble about what amount might be deemed reasonably subject to question.

[3] Surprisingly, this theory is not without support in the case law. The Sixth Circuit embraced such a claim in *Damiano v. Matish*, 830 F.2d 1363, 1370 (6th Cir.1987), and even one pre-*Hudson* Ninth Circuit case seems to have casually mentioned the unavailability of funds as a factor in establishing first amendment harm. *Seay v. McDonnell Douglas Corp.*, 427 F.2d 996, 1004 (9th Cir.1970). For the reasons explained in text, we should decline to follow the ill-advised ruling of the Sixth Circuit. And, in the two decades that it has been on the books, the *Seay* dictum has never been followed; any precedential effect it may have had has surely been dissipated by the Supreme Court's intervening ruling in *Hudson*.

fees are used for nonrepresentational purposes. *Id.* at 307, 106 S.Ct. at 1076. Plaintiffs make no claim about the timing or adequacy of the arbitration procedure.

Unlike the majority here and the Sixth Circuit in *Tierney v. City of Toledo*, 824 F.2d 1497 (6th Cir.1987), I see nothing in *Hudson* that prevents the union from temporarily withholding that portion of the agency fees that is to be used for nonrepresentational purposes. The Court's concern in *Hudson* about *use* of the money for prohibited purposes is not relevant here; no legitimate first amendment interest is violated by the temporary *collection* of the money. Any due process concern is satisfied by the fact that there is an accounting, the opportunity to have the matter resolved by an impartial arbitrator, and the payment of interest (or its equivalent, an advance rebate) to make up for any lost use of the funds. I might be more concerned if the amounts in question were larger, if they threatened to deny plaintiffs and their families food and shelter. *See Goldberg v. Kelly*, 397 U.S. 254, 90 S.Ct. 1011, 25 L.Ed.2d 287 (1970). But we're talking about $8 a month for three or, at most, seven months, an amount unlikely to break the family budget.

Nor does *Hudson* call into question the union's method of notification, as *Hudson*'s discussion of notice goes entirely to completeness and accuracy. Nothing would be gained by giving nonmembers the information before any deductions are made. The relevant event is not the commencement of the deductions but the deadline for requesting a refund or review by an impartial arbitrator. Notice, after all, must have a purpose. The purpose here is to allow nonmembers to make a meaningful decision in exercising their right to object. So long as the union provides adequate information well in advance of the time when nonmembers must raise their objections, the purpose of notice is amply served.

[1232] II

Plaintiffs find themselves in an uncomfortable situation: They are represented by a union they do not support and to

which they are, nevertheless, forced to contribute. They obviously resent this and bristle at being deprived, even temporarily, of a portion of their income. These are legitimate concerns, but the union has legitimate interests as well. Under applicable law, the union is the bargaining unit's lawful representative, and it is entitled—indeed required—to collect from everyone in the unit a pro rata share of the funds it expends on representational activities, and to do so in an orderly and cost-efficient manner.

Ideally, of course, the union would collect from nonmembers only that portion of the agency fee dedicated to representational purposes. But that is not so easy to accomplish in practice. Here, the union has advanced a legitimate, neutral reason for the procedure it has adopted: It is impossible or, at any rate, very difficult, to identify the objectors during summer vacation, when the names and addresses of all the teachers are not yet known.[4] In light of this constraint, the union has come

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[4] The burdens and difficulties imposed on the union by alternate procedures are detailed in the stipulation of the parties below:

> In developing its agency fee rebate procedure, CTA considered sending fee payers the Hudson notice before any deductions took place, rather than immediately following the first deduction as is provided in CTA's rebate procedure. However to send the notices before deduction was considered basically unworkable, given the school year nature of employment of the teachers that CTA locals represent. In schools, virtually all teachers are employed for the entire school year and virtually all new employees begin work at the same time—the start of the school year around September 1. If notices were sent prior to the start of the school year several problems would result. Many notices would go to the wrong address since approximately 8% of teachers change addresses each summer and the notices are sent, if possible, to their home addresses. Changed addresses for teachers are typically not available from the districts until the end of the first month of school. In addition, teachers for whom CTA has only a school addresses would not receive a notice. Many unnecessary notices would be sent at great expense to teachers who had retired or changed school districts. Finally, new teachers are typically given 30 days to decide whether to join the union or become a fee payer.

up with a procedure that accommodates the legitimate interests of the minority, while preserving the union's right to collect agency fees without undue administrative costs. Tyranny of the majority this simply is not.

I do see, however, a different kind of tyranny in this case—the tyranny of the modern lawsuit. In a dispute over interests that are, in my judgment, adequately served and in any event minuscule, the plaintiffs have managed to impose on the [1233]defendants very substantial litigation costs. Win, lose or draw, the union will have spent a substantial chunk of the funds

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Consequently, these teachers could not receive a notice prior to the first deduction (September 30) unless the date of the first deduction were postponed. If postponed, new teachers would have a different pro-rated agency fee deducted than continuing teacher/fee payers, a result with other problems (see below).

In developing the procedure CTA also considered having objecting fee payers pay a reduced fee consistent with CTA's estimate of chargeable expenditures. This procedure was not adopted for several reasons. CTA had used a reduced fee system in the past but experienced problems because several school districts had refused to deduct a different amount for agency fees than for member dues. Moreover, use of a reduced fee would require that Hudson notices be sent at least 30 days *prior* to the first deduction so the identities of the objecting fee payers could be determined. This was considered unworkable as discussed above. The only other option is to send the notices on October 15 when identities of the year's fee payers and their addresses are known, and to delay collection of the fee until the end of December when the identities of objectors who would be entitled to a reduced fee are known. This would deprive CTA, NEA and affiliated locals of any agency fees for four months each year. In addition, if collection is delayed for four months, fee payers would then have to pay a much larger amount each month in fees for the rest of the school year than members pay in dues in order to recoup amounts owed for the four months when deductions did not take place. All fee deductions in school districts are normally divided over a ten month period. CTA was concerned that this unequal deduction might raise equal protection claims. Accordingly, after careful consideration, the current system was adopted.

Stipulation at 16-18 (filed Sept. 19, 1988) (emphasis in original).

collected and earmarked for representation. Moreover, the majority's ruling will impose on the union a burden vastly out of proportion to any benefits plaintiffs may gain by getting their $8 a month starting in September rather than December.[5]

We do the judicial system, and the society it serves, serious harm when we countenance such *bagatelle* litigation. Life in modern society is complicated and not every dissatisfaction should find a remedy in court. *See Oki America, Inc. v. Microtech Int'l, Inc.*, 872 F.2d 312, 315 (9th Cir.1989) (Kozinski, J., concurring). If plaintiffs are unhappy with the union, they have every right to vote against it, persuade others to do the same, or lobby the legislature for repeal of laws that force them to contribute to a union to which they do not belong and which they obviously resent. But using litigation to pursue such political objectives by making life difficult for the union is not appropriate. We have a responsibility to avoid encouraging such lawsuits, which are not only costly to the parties involved but divert scarce judicial resources from more pressing and significant issues. Four circuits have held that lawsuits such as this one have no merit; we make a serious error—prudentially as well as legally—by refusing to follow suit.

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[5] The majority suggests that focusing on the small amounts in issue would "improperly place a pricetag on constitutional rights." Maj. op. at 1228 n. 7. Not so. My point is that there is no constitutional right at stake here at all, so the *only* thing in issue is the precise timing when plaintiffs are to receive a little bit of money.

ORDER OF THE UNITED STATES

DISTRICT COURT FOR THE

CENTRAL DISTRICT OF CALIFORNIA

October 4, 1988

[Clerk's Stamp Omitted in Printing]

UNITED STATES DISTRICT COURT

CENTRAL DISTRICT OF CALIFORNIA

DEBRA J. GRUNWALD, et al.,	CASE #CV 87-3381 WDK (JRX)
Plaintiffs,	ORDER RE FINAL JUDGMENT AND ISSUANCE OF PERMANENT INJUNCTION
v.	
SAN BERNA[R]DINO CITY UNIFIED SCHOOL DISTRICT, et al.,	
Defendants.	

This matter came before the Court on the Plaintiffs' Motion For a Permanent Injunction. Having considered the materials submitted and the arguments of counsel at the September 19, 1988, hearing, the Court hereby Orders that the Motion is Granted in Part. This Order is based on the following considerations:

1. Any permanent injunction issued by this Court against the San Berna[r]dino Unified School District must be a narrowly tailored remedy. The Ninth Circuit has held, "Injunctive relief against a state agency or official must be no broader than necessary to remedy a constitutional violation. *Toussaint v. McCarthy*, 801 F.2d 1080, 1086 (9th Cir. 1986), *cert denied* 107 S.Ct. 2462 (1987). This Court's function in reviewing the agency fee procedure is limited to "determining whether a constitutional violation has occurred and to fashioning a remedy which does no more and no less than correct the constitutional violation". *Id.* at 1087.

2. In *Chicago Teachers Union v. Hudson*, 475 U.S. 292 (1986), the Supreme Court established the constitutional requirements under the First and Fourteenth Amendments for the collection of agency fees. In *Hudson*, the Supreme Court set forth three procedural requirements for this collection of fees:

> [1] an adequate explanation of the basis for the fee must be provided;
>
> [2] agency fee payers must be given a reasonably prompt opportunity to challenge the amount before an impartial decision-maker; and
>
> [3] the procedure must preclude the use of nonmembers' funds to finance ideological activities unrelated to collective bargaining and contract administration.

Hudson, 475 U.S. at 305-307.

The Supreme Court in *Hudson* also emphasized that in any agency fee plan, the union must bear the burden of proving what proportion of its expenditures was for collective bargaining and contract administration. *Hudson*, 475 U.S. at 306. In the Agency Fee Collection And Rebate Procedure (hereinafter "Procedural Guidelines") established by the California Teachers Association (hereinafter "CTA") and adopted by the San Berna[r]dino Unified School District, this burden is not explicitly recognized as the standard for the review procedure. The only language in the Procedural Guidelines which remotely resembles a recitation of the union's burden merely states, "The impartial decision-maker shall apply recognized legal concepts in determining the appropriate rebate." *See* Procedural Guidelines, Sec III(D). This general language does not meet the *Hudson* requirement.

However, the Court does find that the stipulated facts establish that the arbitrator did, in fact, apply the proper standard when reviewing the union expenditures in the hearings held in the last two years.

3. This Court holds that an agency fee plan with post-deduction notice of *Hudson* rights, and an escrow of all nonmember funds until the proportion of chargeable expenditures is determined by the union, is constitutional. The plain language of *Hudson* clearly indicates that a 100% escrow more than satisfies the constitutional requirement that nonmember fees not be used for ideological purposes by a union. *Hudson*, 475 U.S. at 310. Furthermore, the Court in *Hudson* did not set forth any requirement that notice to nonmembers of the right to object to the agency fee plan be made before any fees are deducted from their wages.

4. The CTA and the San Berna[r]dino Unified School District did not provide the plaintiffs rebates for the two month period during the 1986-1987 fiscal year when the agency fee plan was in force. Defendants have asserted that the plaintiffs are precluded from collecting the rebate for that period because they did not comply with the requirements of Sections III(a) and III(c) of the Procedural Guidelines. These sections require that all persons who wish to obtain a rebate must advise the CTA of their objections in writing. Furthermore, this notice of objection must be filed within 30 days and include the name, address, local union chapter, and social security number of the objector.

Plaintiffs filed this action on May 27, 1987. The CTA was added as a party on May 28, 1987. Plaintiffs' complaint alleged that the agency rebate system was unconstitutional. Surely, an objection by these teachers to any of their money being collected is sufficient objection to the proportional rebate system established by the union. The complaint was written, included the names of all the plaintiffs and was obviously received by the CTA, as the CTA appeared in this Court and responded in writing to the successful application of these teachers for a temporary restraining order. In addition, defendants only sent out their *Hudson* notices from May 28, 1987 through June 2, 1987. Not only was the complaint filed before the 30 day period provided by the union in its Procedural Guidelines, the complaint was filed before notice of the right to object was sent by the union. Also, since the teachers were suing the San Berna[r]-

dino Unified School District, it was readily apparent to the CTA which local chapter of the union was involved in the dispute. Thus, the Court finds that the plaintiffs substantially complied with the CTA's notice requirement for objections.

5. Defendants' Procedural Guidelines reserve the right of the union to no longer have a hearing in front of an arbitrator and adopt whatever procedure is created by the Public Employment Relations Board (hereinafter "PERB"). This Court notes that *Hudson*'s only reference to the type of hearing required was that it need not be a "full-scale administrative hearing". *Hudson*, 475 U.S. at 308 n.21. The amorphous issue of the constitutionality of the unknown form of a potential PERB procedure is not ripe for adjudication at this time. *See e.g. Abbott Laboratories v. Gardner* 387 U.S. 136 (1966). Nevertheless, the Court cautions the CTA against changing the form of the hearing in such a way that it impinges on the procedural due process rights of the teachers.

Based upon the above considerations, Defendants San Berna[r]dino Unified School District and the California Teachers Association are ordered to do each of the following:

(A) Revise Section III(D) of the Procedural Guidelines to include language which explicitly states that the CTA bears the burden of proving it has determined the correct amount for its expenditures on collective bargaining and contract administration.

(B) Provide all of the teachers who were plaintiffs in this action with a rebate for the two month period during which the agency fee procedure was in effect in the 1986-1987 fiscal year.

This Order supersedes any preliminary or tenative ruling made by this Court at the hearing on September 19, 1988.

IT IS SO ORDERED

DATED: OCTOBER 4, 1988.

/s/
William D. Keller
United States District Judge

RELEVANT PARTS OF THE

CALIFORNIA STATUTES

RELEVANT PARTS OF THE CALIFORNIA STATUTES

California Education Employee Relations Act, Cal. Ann. Gov. Code

§ 3540.1. Definitions

(i) "Organizational security" means * * * (2) An arrangement that requires an employee, as a condition of continued employment, either to join the recognized or certified employee organization [i.e., exclusive representative], or to pay the organization a service fee in an amount not to exceed the standard initiation fee, periodic dues, and general assessments of the organization * * * .

§ 3546. Necessity of arrangement to be agreed upon by both parties; rescission

[O]rganizational security, as defined, shall be within the scope of representation.

Cal. Ann. Educ. Code

§ 45061 Deductions for organization service fees

The governing board of each school district when drawing an order for the salary or wage payment due to a certificated employee of the district shall * * * reduce the order for the payment of service fees to the certified or recognized organization as required by an organizational security arrangement between the exclusive representative and a public school employer as provided under [the Education Employee Relations Act] * * * .

Supreme Court, U.S.
OCT 18 1993
OFFICE OF THE CLERK

No. 93-253

IN THE
Supreme Court of the United States
OCTOBER TERM, 1993

DEBRA J. GRUNWALD, *et al.*,
Petitioners,
v.
SAN BERNARDINO CITY UNIFIED SCHOOL DISTRICT, *et al.*,
Respondents.

On Petition for a Writ of Certiorari to the United States Court of Appeals for the Ninth Circuit

BRIEF OF RESPONDENT SAN BERNARDINO TEACHERS ASSOCIATION IN OPPOSITION

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COUNTERSTATEMENT OF QUESTIONS PRESENTED

1. When a union that represents public school teachers lawfully may charge objecting nonmembers an annual agency fee of $220 through a system of ten monthly payroll deductions (corresponding to a ten-month school year during which teachers are paid), does the First Amendment require that $22 be deducted each month, or can the union deduct $30 each month (which is the amount of the monthly dues deduction for union members) and make a lump-sum payment of the $80 difference to objecting nonmembers after the third monthly deduction, which is well before the total amount deducted has reached the chargeable $220?

2. When (a) a union that represents public school teachers conducts a timely hearing to determine the amount of the annual agency fee to be paid by objecting nonmembers for a school year, (b) all nonmembers receive an adequate explanation of the basis for the agency fee sufficiently in advance of the hearing to enable them to file objections and prepare for the hearing, and (c) the union places all agency fee payments collected from nonmembers into an escrow account until the explanation has been received and the nonmembers have had an opportunity to object, is the First Amendment violated because the first monthly deduction is made a few weeks before the explanation of the basis for the agency fee has been received?

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IN THE

Supreme Court of the United States

OCTOBER TERM, 1993

No. 93-253

DEBRA J. GRUNWALD, *et al.*,
Petitioners,

v.

SAN BERNARDINO CITY UNIFIED SCHOOL DISTRICT, *et al.*,
Respondents.

On Petition for a Writ of Certiorari to the United States Court of Appeals for the Ninth Circuit

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BRIEF OF RESPONDENT SAN BERNARDINO TEACHERS ASSOCIATION IN OPPOSITION

COUNTERSTATEMENT OF THE CASE

Petitioners are public school teachers employed by respondent San Bernardino City Unified School District ("District") in a bargaining unit for which respondent San Bernardino Teachers Association ("SBTA") is recognized under California law as the exclusive collective bargaining representative. During the 1987-88 school year, petitioners chose not to become members of SBTA, and, pursuant to the collective bargaining agreement between SBTA and the District, petitioners were required to pay to SBTA an agency fee for that school year.[1] In this case,

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[1] SBTA is affiliated with the California Teachers Association ("CTA") and the National Education Association ("NEA") at the state and national levels, respectively. A portion of the agency fees

petitioners challenge the constitutionality of certain aspects of SBTA's agency fee collection procedure.

In *Chicago Teachers Union v. Hudson*, 475 U.S. 292, 310 (1986), this Court held that:

> the constitutional requirements for [a public sector] Union's collection of agency fees include an adequate explanation of the basis for the fee, a reasonably prompt opportunity to challenge the amount of the fee before an impartial decisionmaker, and an escrow for the amounts reasonably in dispute while such challenges are pending.

Petitioners do *not* contend that they were denied any of the three procedural requisites specified in *Hudson*,[2] but petitioners assert that SBTA's agency fee collection procedure is constitutionally flawed in two other respects:

1. Although petitioners were *not* required to pay, even into escrow, more than the amount they lawfully could be charged *for the school year*, petitioners complain because their first three monthly payroll deductions were made in amounts equal to the deductions for union membership dues, rather than at

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involved in this case was paid to CTA and NEA. Except where context requires otherwise, we will refer to CTA, NEA and SBTA collectively as "SBTA."

[2] The district court found that "the information provided to nonmembers [was] adequate," Order re Preliminary Injunction at 2 (June 15, 1987), and petitioners have not challenged that finding. SBTA provided objectors with a hearing before an impartial arbitrator selected by the American Arbitration Association. Appendix to Petition for Certiorari ("Pet. App.") at 3a. Petitioners do not challenge the fairness or timeliness of the hearing. Nor is there any dispute as to the adequacy of the escrow arrangement: SBTA placed *all* of the agency fees paid by nonmembers into escrow until the nonmember accepted the union's calculation of the amount to be paid, or, if the nonmember challenged SBTA's calculation, until the challenge was resolved. Pet. App. at 6a. *See infra* at 3-4.

a reduced level. Petition for a Writ of Certiorari ("Pet.") at 3-4 and n.3, 12-25.

2. Although petitioners do not dispute that the hearing provided pursuant to *Hudson* properly may be held after the monthly payroll deductions have begun, they contend that the notice to nonmembers explaining the basis for the agency fee and affording nonmembers the opportunity to object must precede the first monthy payroll deduction. In this case, the notice was not distributed until "after the first fee deductions occur[red]." Pet. at 3, 25-29.

The facts bearing on these two issues, as set forth in a Stipulation submitted jointly by the parties in the district court, are as follows.

The annual dues for members of SBTA are deducted by the District on a 10-month basis, corresponding to the 10-month school year during which teachers are paid. The first dues deduction occurs on or about September 30, and the last deduction on or about June 30. Pet. App. at 3a. Teachers in the relevant bargaining unit who choose not to join SBTA are required to pay an annual agency fee, and these fees likewise are deducted by the District on a 10-month basis. Each monthly agency fee deduction is equal in amount to the monthly membership dues deduction—but, as will be described below, any nonmember who objects to paying the full amount of the annual agency fee is entitled to receive an offsetting lump sum payment from SBTA before the total amount deducted has exceeded the chargeable portion of the fee. *Id.*

From the start of the school year, *all* agency fees are placed in an interest-bearing escrow account. *Id.* And, no later than October 15—*i.e.*, within two weeks of the first monthly deduction—all nonmembers receive a notice advising them of their right to pay less than the full agency fee (*i.e.*, to pay less than the equivalent of membership dues). The notice explains the procedure to be followed if a nonmember wishes to pay a reduced amount, and

presents SBTA's calculation of the reduced amount that it believes lawfully may be charged to objectors, together with an explanation of how that amount was determined. *See supra* note 2.

The parties stipulated that SBTA had considered sending the notices at an even earlier point in the school year, but this "was considered basically unworkable, given the school year nature of employment of the teachers." Stipulation at 16. The parties' Stipulation elaborated on that point as follows:

> In schools virtually all teachers are employed for the entire school year and virtually all new employees begin work at the same time—the start of the school year around September 1. If notices were sent prior to the start of the school year several problems would result. Many notices would go to the wrong address since approximately 8% of teachers change addresses each summer and the notices are sent, if possible, to their home addresses. Changed addresses for teachers are typically not available from the districts until the end of the first month of school. In addition, teachers for whom CTA has only a school address would not receive a notice. Many unnecessary notices would be sent at great expense to teachers who had retired or changed school districts. Finally, new teachers are typically given 30 days to decide whether to join the union or become a fee payer. [*Id.*]

Thus, as the court of appeals recognized, *see* Pet. App. at 9a-10a, in effect the notices are sent within two weeks after the identities and home addresses of the nonmembers for the school year can be determined.

Under the procedure set out in the notice, nonmembers who object to paying the full agency fee are given two options. They may accept SBTA's calculation of the chargeable amount, in which case SBTA gives them, by December 7, a lump sum payment equal to the nonchargeable portion of the fee *for the entire school year*. *See* Pet. App. at 3a. Or, if they prefer, objectors may

elect to challenge SBTA's calculation of the chargeable amount before an impartial arbitrator, in which case a hearing is held, the arbitrator renders his or her decision, and SBTA then makes a lump sum payment equal to the nonchargeable portion of the fee as determined by the arbitrator, again *for the entire school year. Id.* at 3a-4a.

In short, as the parties' Stipulation put it, SBTA's agency fee collection procedure provides "an *advance* rebate for the entire year which, in effect, operates as an *up-front* reduction in the fee amount for the remainder of the school year." Stipulation at 4 (emphasis added).

For the 1987-88 school year, those objecting nonmembers who accepted SBTA's calculation of the chargeable amount received a lump sum payment equal to the nonchargeable portion of the full annual agency fee after there had been three monthly payroll deductions —*i.e.*, after they had paid 30% of the full fee. Those objecting nonmembers who challenged SBTA's calculation in arbitration received a lump sum payment equal to the nonchargeable portion of the full annual agency fee as determined by the impartial arbitrator after there had been seven monthly deductions—*i.e.*, after they had paid 70% of the full fee. *See* Pet. at 4 n.3.[3] The impartial arbitrator determined that more than *80%* of the full agency fee was properly chargeable to objecting fee payers, Exhibit 14 to Stipulation at 260, and petitioners do not challenge that determination. Thus, *no objecting nonmember paid, even into escrow, more than the chargeable portion of the full annual agency fee,* and petitioners are simply wrong when they assert that SBTA received "sums the union admits it is not entitled to keep." Pet. at 14.

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[3] The SBTA procedure calls for this post-arbitration payment to be made by mid-February, Pet. App. at 3a-4a—*i.e.*, at a point when an objector has paid 50% of the fee—but during the 1987-88 school year there was a delay and the payment was not made until mid-April. *See* Pet. at 4 n.3.

The parties' Stipulation explained why SBTA had adopted a system of uniform monthly deductions for union members and nonmembers, coupled with advance lump-sum payments for objecting nonmembers, rather than a system under which each monthly deduction would be slightly lower for an objecting nonmember than for a dues payer. The Stipulation stated:

> In developing the procedure CTA also considered having objecting fee payers pay a reduced fee consistent with CTA's estimate of chargeable expenditures. This procedure was not adopted for several reasons. CTA had used a reduced fee system in the past but experienced problems because school districts had refused to deduct a different amount for agency fees than for member dues. Moreover, use of a reduced fee would require that *Hudson* notices be sent at least 30 days *prior* to the first deduction so the identities of the objecting fee payers could be determined. This was considered unworkable as discussed above. The only other option is to send the notices on October 15 when identities of the year's fee payers and their addresses are known, and to delay collection of the fee until the end of December when the identities of objectors who would be entitled to a reduced fee are known. This would deprive CTA, NEA and affiliated locals of any agency fees for four months each year. In addition, if collection is delayed for four months, fee payers would then have to pay a much larger amount each month in fees for the rest of the school year than members pay in dues in order to recoup amounts owed for the four months when deductions did not take place.

Stipulation at 17 (emphasis in original).

REASONS FOR DENYING THE WRIT

Petitioners challenge SBTA's agency fee collection procedure as having failed to provide an "advance reduction," Pet. at 12-25, and an "advance notice," *id.* at 25-29. According to petitioners, these challenges present questions of "exceptional importance," *id.* at 8, as to which the decision below conflicts with decisions of this Court and of other circuits. As we now demonstrate, there is no merit to this assertion. The questions presented by petitioners are trifling, and are of no constitutional significance. Nor is there any conflict with decisions of this Court or other circuits on the questions presented here. The case does not warrant review by this Court on any ground.

I. THE "ADVANCE REDUCTION" ISSUE

A. Petitioners' "advance reduction" argument is in reality a dispute over which of two constitutionally acceptable payment schedules should be used to collect the chargeable portion of the annual agency fee from objecting nonmembers.

The financial impact on objecting nonmembers of the payment schedule used by SBTA is reflected in the following table, using the example given by the court of appeals, in which the full amount of the agency fee is $300 and the amount chargeable to objectors is $220: [4]

[4] *See* Pet. App. at 2a-6a. In this illustration the chargeable amount ($220) constitutes 73% of the full fee ($300). As we have noted, for the 1987-88 school year the impartial arbitrator determined that more than 80% of the full fee was properly chargeable to objectors. The point made in the text would not change if the hypothetical numbers were replaced by the actual numbers.

Month	Amount Deducted Each Month from Objecting Nonmembers' Salary	Lump Sum Payment Made by SBTA to Objecting Nonmembers	Cumulative Amount Paid by Objecting Nonmembers
September	$30		$30
October	$30		$60
November	$30		$90
December	$30	$80	$40
January	$30		$70
February	$30		$100
March	$30		$130
April	$30		$160
May	$30		$190
June	$30		$220

Petitioners assert that this "dues-equivalent fee deduction" schedule, Pet. at 18 n.20, fails to pass constitutional muster. According to petitioners, the First Amendment requires that the $220 annual agency fee be collected in the manner shown below:

Month	Amount Deducted Each Month from Objecting Nonmembers' Salary	Cumulative Amount Paid by Objecting Nonmembers
September	$22	$22
October	$22	$44
November	$22	$66
December	$22	$88
January	$22	$110
February	$22	$132
March	$22	$154
April	$22	$176
May	$22	$198
June	$22	$220

As can readily be seen, although objecting nonmembers would under petitioners' payment schedule pay slightly less during the first three months of the school year than they would under SBTA's payment schedule (*i.e.*, $66 as compared to $90), petitioners' schedule entails *higher* cumulative payments for the next *six* months.[5]

[5] On balance, as the court of appeals recognized, under SBTA's payment schedule the objecting nonmember actually "makes a

These minimal differences in the timing of the financial impact of the two payment schedules surely do not give rise to a question of "exceptional importance," Pet. at 8, deserving of review by this Court. Because SBTA does not under *either* payment schedule *collect*, much less expend, even "three pence" that it "is not entitled to keep," Pet. at 14, the choice between the two payment schedules does not in any way implicate First Amendment concerns.

B. Asserting that this is a case in which SBTA "improperly seized" money to which it was not entitled, and then repaid the money belatedly, Pet. at i, petitioners claim that the decision below conflicts with the decisions of this Court and of other circuits which, according to petitioners, have declared such a seizure impermissible. *Id.* at 12-25. Because petitioners have mischaracterized the nature of SBTA's agency fee collection procedure, their exegesis is directed at an issue not presented here.

There is, to be sure, a disagreement among the circuits as to whether a union may collect from objecting nonmembers an agency fee that exceeds the amount properly chargeable to objectors, and then refund the difference at some later point. Proceeding from the premise that the "constitutional right [at stake is a right] to 'prevent the Union's *spending* a part [of the objectors'] required service fees to contribute to political candidates and to express political views unrelated to its duties as

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profit" compared to what would transpire under petitioners' approach. Pet. App. at 6a and n.3. As the opinion notes, even a fee payer who challenges SBTA's calculation in arbitration and therefore receives a lump sum payment later in the year "still makes a profit, albeit a less munificent one." *Id.* (The "profit" is actually somewhat greater than the court assumed, because the lump sum payment made to objectors includes interest. *See* Exhibit 10 to Stipulation at 2). In any event, petitioners' Questions Presented refer to the fee payers who receive the lump sum payment after "two and one-half months," *see* Pet. at i, and that is the situation we have discussed in text.

exclusive bargaining representative,'" *Hudson*, 475 U.S. at 301-02 (emphasis added), and that no violation can arise from "the mere collection of funds" which are not spent, *Machinists v. Street*, 367 U.S. 740, 771 (1961), a number of courts of appeals have held that such a system is permissible as long as the excessive collections are held in escrow and not spent.[6] On the other hand, one circuit —the Sixth—has held that even the use of an escrow system does not justify a union's collection of a fee that "include[s] amounts which are undisputedly unrelated to the collective bargaining functions of the union, and which cannot be collected from objecting employees." *Damiano v. Matish*, 830 F.2d 1363, 1370 (6th Cir. 1987). *See also Tierney v. City of Toledo*, 824 F.2d 1497, 1502-03 (6th Cir. 1987) (*Tierney I*) (union is not free "to have any sum collected, even if placed in escrow, which would unquestionably represent ideological expenses of the union"); *Tierney v. City of Toledo*, 917 F.2d 927, 937 (6th Cir. 1990) (*Tierney II*) (to same effect).[7]

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[6] Consequently (and again relying on decisions of this Court), the courts that have rejected the need for an "advance reduction" have reasoned that a union satisfies the constitutional requirements if it provides either "advance reduction of dues and/*or interest-bearing escrow accounts*" so as to ensure that objectors' funds are never spent for nonchargeable matters. *Ellis v. Railway Clerks*, 466 U.S. 435, 444 (1984) (emphasis added), *quoted in Hudson*, 475 U.S. at 303-04.

The judges in the court below agreed that four circuits have expressed this view. *See* Pet. App. at 5a n.2 (majority opinion, per Kozinski, J.); *id.* at 26a-27a (original panel opinion, per Brunetti, J.) (subsequently withdrawn). Petitioners acknowledge two circuits as having expressed this view, but they assert that the other cases cited by the court below are equivocal. *See* Pet. at 20-21.

[7] Petitioners cite in addition *Hohe v. Casey*, 956 F.2d 399 (3d Cir. 1992). Although the court there stated that "[i]n calculating the fair share fee, a union is required to determine an appropriate advance deduction," *id* at 414, the court did not discuss the point, nor did it cite any authority for the requirement of an "advance" deduction. Furthermore, the question before the court was not

Although we believe that the Sixth Circuit is wrong on the issue it decided,[8] there is no need for present purposes to pursue the point. The concerns expressed in the Sixth Circuit cases cited by petitioners, which refer to the collection of money "which would unquestionably represent ideological expenses of the union," simply are not implicated here. As we have shown, SBTA sets its agency fee and calculates the portion of the fee that is chargeable to objecting nonmembers on *an annual basis*; and that approach clearly is allowed by *Hudson*. *See* 475 U.S. at 307 (notice should explain what proportion of "the Union's total annual expeditures" is considered chargeable); *id.* at n.18 ("the Union cannot be faulted for calculating its fee on the basis of its expenses during the preceding year"). And petitioners did *not* pay, even into escrow, more than the chargeable amount for the school year in question. *See supra* at 5, 7-9.

Petitioners' reliance on the general proposition that agency fee collection procedures should be designed to "minimize the infringement" of First Amendment rights,

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whether there was a need for an *advance* reduction as such, but whether the union had used a proper method for determining *the appropriate chargeable proportion* of the fee.

[8] Through imaginative use of italics, ellipsis, and quotation out of context, petitioners attempt to create the impression that this Court held in *Hudson* that an "advance reduction" is required. *See* Pet. at 12-15. That is not the case. The *Hudson* Court's carefully worded holding, quoted *supra* at 2, contains no mention of such a requirement, nor does the opinion contain any discussion as to the need for an advance reduction. The union in *Hudson used* an advance reduction system; and, because the notice sent by the union took the form of an explanation as to how the union had made the chargeability determinations embodied in the union's calculation of the advance reduction, the Court referred to the advance reduction in discussing the inadequacy of the information that had ben provided in the notice. *See* 475 U.S. at 295, 306-07, 309. But the Court's discussion was directed at the question of *adequacy of notice*, not at any requirement of *advance reduction* as such.

Pet. at 19 (quoting *Hudson*, 475 U.S. at 303-07 & n.20), is likewise misplaced. The payment schedule used by SBTA has no greater impact on First Amendment rights than does the schedule advocated by petitioners. It is obvious, and petitioners do not deny, that the interest in *avoiding compelled subsidization of ideological activities* —which *Hudson* identified as the right at issue in agency fee cases, *see* 475 U.S. at 302—is fully protected by an escrow procedure, without the need for any advance reduction. Seeking to escape the force of that fact, petitioners posit the existence of a separate and distinct First Amendment right not to be deprived of the use of one's money. *See* Pet. at 15-16. But, even assuming *arguendo* that such a "right" (nowhere mentioned in *Hudson*) might be recognized in some contexts,[9] the "right" is not implicated here in any meaningful way. As indicated, under SBTA's payment schedule, the objecting nonmember is not deprived of any money that SBTA "is not entitled to keep," Pet. at 14, and, indeed, the objector actually "makes a profit" during the course of the school year. *See supra* at 7-9 & n.5.

In sum, to the extent that the circuits have expressed differing views on the question of the need for an "advance reduction," they have done so with reference to situations where a union collects a greater amount from objecting nonmembers than that to which it is entitled. Because SBTA does not do this, petitioners' "advance reduction" argument reflects nothing more than their personal preference for one payment schedule rather than another, and does not present a constitutional question that warrants review by this Court.[10]

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[9] That is a dubious assumption at best. *See* Pet. App. at 7a; *Arcara v. Cloud Books, Inc.*, 478 U.S. at 697, 705-06 (1986).

[10] We need not consider whether other questions might be presented if there were *no* reason for SBTA to have used the payment schedule that it did. The parties have *stipulated* that there were legitimate reasons for SBTA's choice. *See supra* at 6, Peti-

II. THE "ADVANCE NOTICE" ISSUE

SBTA sent its *Hudson* notice in mid-October, which was some two weeks after the first monthly agency fee deduction was made. Petitioners maintain that in approving this sequence of events, the decision below "conflicts with this Court's decision in *Hudson* and decisions of other United States Courts of Appeals." Pet. at 25. In point of fact, there is no such conflict, and the "advance notice" issue presented by petitioners is of no constitutional significance.

A. Petitioners make no attempt to indicate what constitutional purpose might be served by advancing the sending of the notice, and in point of fact there is none. *Hudson* makes it clear that a union need not provide any kind of hearing before agency fees are collected. Rather, the union's obligation is to provide a "reasonably prompt" hearing *after the fees have been collected*, and to place the disputed funds "[in] escrow . . . while . . . challenges are pending." 475 U.S. at 310. Thus, *Hudson* does *not* require unions to consider objections in advance of the post-collection hearing, and no court has imposed such a requirement.

Because objections need not be considered until the post-collection hearing is conducted, the purpose of the notice is fully served as long as (1) the notice is received sufficiently in advance of the hearing to enable nonmembers to exercise their right to object and to prepare for the hearing,[11] and (2) all nonmembers are treated as

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tioners miss the point in characterizing these reasons as matters of "administrative convenience" that cannot justify an infringement of First Amendment rights. *See* Pet. at 17-20. As we have noted, SBTA's payment schedule works no infringement beyond what would be entailed by the payment schedule proposed by petitioners themselves.

[11] It is axiomatic that "[t]he purpose of notice under the Due Process Clause is to apprise the affected individual of, and permit adequate preparation for, an impending 'hearing.'" *Memphis Light, Gas & Water Div. v. Craft*, 436 U.S. 1, 14 (1978).

objectors, with their fee payments held in escrow, until they have received the notice and the deadline for filing objections has passed.

If those steps are taken, there is absolutely no reason why the notice should have to precede the first monthly payroll deduction. Judge Kozinski put the point well in his dissent from the original panel decision in this case:

> Nothing would be gained by giving nonmembers the information before any deductions are made. The relevant event is not the commencement of the deductions but the deadline for requesting a refund or review by an impartial arbitrator. Notice, after all, must have a purpose. The purpose here is to allow nonmembers to make a meaningful decision in exercising their right to object. So long as the union provides adequate information well in advance of the time when nonmembers must raise their objections, the purpose of notice is amply served.

Pet. App. at 35a.

It is undisputed that the notices in this case were sent in sufficient time to enable nonmembers to exercise their right to object and to prepare for the arbitration hearing. It also is undisputed that all agency fees collected were escrowed until nonmembers had received the notice and had declined to object. Hence the objecting nonmembers' rights were fully protected.[12]

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[12] We can conceive of only one set of circumstances under which the challenged sequence of events would present a constitutional issue. *If* under a union's agency fee collection procedure, the first agency fee deduction included money which the union was not legally permitted to keep, and *if* (as the Sixth Circuit has held) the mere collection of such money, even though it is kept in escrow, violates the First Amendment rights of objecting nonmembers, it then would be constitutionally necessary to notify nonmembers and afford them the opportunity to object before the first agency fee deduction took place. But that is not this case. As shown in Part I above, under SBTA's agency fee collection procedure, neither the pre-notice deduction, nor indeed any subsequent deduction, includes any money that SBTA is not entitled to keep.

B. Petitioners' effort to portray a conflict among the circuits on this issue, *see* Pet. at 27-29, is unavailing. Petitioners cite language from *Tierney I*, *supra*, 824 F.2d at 1503, 1506, but that language is dictum, because the agency fee collection procedure in that case failed to provide notice *before the deadline for filing objections*. *Id.* at 1506. Petitioners cite *no* case in which an agency fee notice *that preceded the deadline for filing objections* was held to be untimely merely because it came shortly after the first monthly deduction had been made—much less any case that imposed such a hard and fast rule where, as here, notice was sent at the *earliest practicable point*. *See supra* at 4.[13]

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[13] In addition to *Tierney I*, petitioners cite *Dean v. TWA*, 924 F.2d 805 (9th Cir. 1991) (agency fees); *Dashiell v. Montgomery County*, 925 F.2d 750 (4th Cir. 1991) (agency fees); *Schneider v. Colegio de Abogados*, 917 F.2d 620 (1st Cir. 1990), *cert. denied*, —— U.S. ——, 112 S.Ct. 865 (1992) (bar dues); *Galda v. Bloustein*, 686 F.2d 159 (3d Cir. 1982), *cert. denied*, 475 U.S. 1065 (1986) (student fees). *See* Pet. at 28-29. None of these cases is on point. In *Dean* the union had not sent a notice at any time. In *Dashiell* the issue on appeal concerned the contents of the notice, not the timing thereof; and the court affirmed a judgment in favor of the union. In *Schneider* the court said that "one way for an objection procedure to work" would be for notice to be given "at the beginning of the due year," 917 F.2d at 635 n.22, but the court did *not* state that this was the *only* way a lawful system could work, nor did the court define precisely what it meant by "the beginning" of the dues year. Finally, *Galda* involved no question of timeliness of notice as such; it involved the question whether student fees compulsorily collected could lawfully be *spent* for non-chargeable purposes, with the objector receiving a refund only after the funds had been spent. In dictum the court cited with a "cf." a law review note in which the author advocated that unions should be required to give advance notice to agency fee payers so as "[to] allow disputes concerning the permissibility of any given expenditure to be resolved *before* an employee has parted with his money." Kenneth L. Karst, *The Supreme Court, 1976 Term—Foreward: Equal Citizenship Under the Fourteenth Amendment*, 91 Harv. L. Rev. 1, 198 (1977) (emphasis in original). As we have noted, *Hudson* subsequently made it clear that unions need

In sum, petitioners' challenge to the timing of SBTA's notice does not present an issue that warrants review by this Court.

CONCLUSION

The Petition for a Writ of Certiorari should be denied.

Respectfully submitted,

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not establish systems which will enable objections to be resolved before fees are collected.

Petitioners' suggestion that *Hudson* itself requires notice prior to the first monthly deduction, *see* Pet. at 25-27, is entirely unfounded. Petitioners rely on the statement in *Hudson* that "constitutional requirements for the Union's collection of agency fees include an adequate explanation of the basis for the fee." 475 U.S. at 310. Underscoring the word "collection" in that sentence, as petitioners do, *see* Pet. at 26, cannot convert the sentence into a statement that the notice must precede the first monthly deduction. *Hudson* contains no suggestion of such a rule.

Petitioners also cite cases from other contexts in which notice has been held to be required before property is taken. *See* Pet. at 27. But those are all contexts in which the cited cases held that a pre-deprivation *hearing* was required. It is well established that the nature and timing of constitutionally adequate notice and hearing depends on the particular context involved, *see generally Matthews v. Eldridge*, 424 U.S. 319 (1976), and *Hudson* settles the point that in the agency fee context, unlike the contexts cited by petitioners, a pre-collection hearing is *not* required. As we have shown, it follows that pre-collection *notice* likewise is not required.

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IN THE

Supreme Court of the United States

OCTOBER TERM, 1993

DEBRA J. GRUNWALD, *et al.*,

Petitioners,

v.

SAN BERNARDINO CITY UNIFIED SCHOOL DISTRICT, *et al.*,

Respondents.

On Petition For a Writ of Certiorari to the United States Court of Appeals for the Ninth Circuit

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PETITIONERS' REPLY BRIEF

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ARGUMENT

I. THE "ADVANCE REDUCTION" ISSUE IS PRESENTED HERE, BECAUSE THE UNION COLLECTS PORTIONS OF THE AGENCY SHOP FEES FROM OBJECTING NONUNION TEACHERS BEFORE THEY ARE OWED

Respondent San Bernardino Teachers Association ("the Association" or "union") acknowledges that there is "a disagreement among the circuits as to whether a union may collect from objecting nonmembers an agency fee that exceeds the amount properly chargeable to objectors, and then refund the difference at some later point." Brief in Opposition ("Opp.") at 9. Yet, the Association argues that certiorari should not be granted, because, it says, this "advance reduction" issue is not actually presented here, *see id.* at 11, even though the Ninth Circuit panel which decided this case obviously thought the contrary, since it divided on the issue.

The Association pretends that the advance reduction issue is not presented, because, under its scheme for collecting agency fees, Petitioner nonunion public school teachers ("the teachers") "did not pay, even into escrow, more than the chargeable amount for the school **year** in question." *Id.* (emphasis altered). However, the issue is presented, because the teachers owe fees to the Association on a **monthly**, not annual, basis. The statute which authorizes the Association to collect fees from the teachers states that the "service fee" is to be "in an amount not to exceed the * * * **periodic** dues * * * of the organization," Cal. Gov't Code § 3540.1(i)(2) (West Supp. 1993) (emphasis added), **not** in an amount not to exceed **annual** dues. Here, the periods for which dues are collected, and for which agency fees thus are owed, are the ten **months** of the school year, not entire fiscal years. Equal amounts become due each month. Petition Appendix ("App.") at 3a.

Because the Association collects an agency fee equal to dues every month, and only rebates the portions that admittedly represent nonchargeable activities after objecting nonmembers have paid full dues for three or seven months, depending on whether they just object or also challenge its calculation of the chargeable amount, during those months the objectors pay more than their pro rata share of the monthly costs of chargeable activities as calculated by the

Association. In short, for three or seven months the teachers are required to pay monies to which the Association indisputably is not entitled **when it collects them**.[1]

The logical extreme of the Association's argument graphically demonstrates its unconstitutional effect. The Association's theory would allow it to require objecting nonmembers to pay the entire chargeable agency fee in a single lump sum at the beginning of the school year, while permitting members and nonmembers who do not object to pay their dues and dues-equivalent fees in ten monthly installments. Under those circumstances, as under the scheme at issue here, objecting nonmembers would "not pay, even into escrow, more than the chargeable amount for the school year in question," Opp. at 11 (emphasis omitted).

However, nonmembers thus would impermissibly be faced with the dilemma of either relinquishing their First Amendment right to withhold their support of the union's nonbargaining activities or their right to pay the agency fee in installments. A public employee may not constitutionally be required to relinquish his right not to subsidize a union's political and ideological activities as a condition of exercising some other right or privilege. *See Abood v. Detroit Bd. of Educ.*, 431 U.S. 209, 241 (1977). Or to state the converse, the government may not deny an individual a benefit because of his or her exercise of First Amendment rights. *See Elrod v. Burns*, 427 U.S. 347, 358-61 (1976) (plurality opinion).

The penalty here for the exercise of the right to object is not as great as in the logical extreme, but it still exists. Using the example given in the Opposition at 8, under the Association's scheme, members and nonmembers who did not object had to pay only 30% ($90) and 70% ($210) of their annual financial obligation to the union ($300) in the first three and seven months of the school year.

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[1] It cannot be assumed that the Association makes no nonchargeable expenditures during the first three and seven months of the school year. That would be contrary to logic and common knowledge, particularly since the first two months are September and October, when most political expenditures are made in an election year. Nor can it be assumed that the monthly agency fees equal to dues paid during the first seven months represent only chargeable costs incurred in those months. *See Abood v. Detroit Bd. of Educ.*, 431 U.S. 209, 237 n.35 (1977).

However, nonmembers who objected had to pay 40.9% ($90) of their annual obligation ($220) in the first three months, and those who also challenged the amount had to pay 95.5% ($210) in the first seven months, all before they received a rebate.

The lesser degree of the penalty under the Association's scheme does not excuse it: "This Court's decisions have prohibited conditions on public benefits, in the form of jobs or otherwise, which dampen the exercise generally of First Amendment rights, however slight the inducement to the individual to forsake those rights." *Elrod*, 427 U.S. at 358 n.11; *see id.* at 359 n.13. Consequently, as *Teachers Local 1 v. Hudson*, 475 U.S. 292, 306 n.16 (1986) (emphasis added), held, the "nonmember's 'burden' [under a lawful arrangement for collecting agency fees] is **simply** the obligation to make his objection known." Because the Association imposes the additional burden on objectors of paying portions of the fees before they are due, this case presents the question of whether "advance reduction" is constitutionally required.[2]

II. BECAUSE COLLECTING COMPULSORY UNION FEES COMPELS ASSOCIATION AND TAKES PROPERTY, ADVANCE REDUCTION TO EXCLUDE UNDENIABLY NONCHARGEABLE AMOUNTS IS REQUIRED AS A MATTER OF FIRST AMENDMENT DUE PROCESS

The Association argues that *Hudson* did not hold that the First Amendment requires advance reduction of the amount collected from dissenters to exclude amounts that are admittedly nonchargeable, as well as escrow of disputed amounts, because the "union in *Hudson* used an advance reduction system." Thus, the Association claims, *Hudson*'s discussion of advance reduction "was directed at the question of adequacy of notice, not at any requirement of advance reduction as such." Opp. at 11 n.8 (emphasis omitted).

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[2] The question is also presented here for another reason. The Association's scheme does not guarantee that it will **never** collect more from objectors than it is entitled to on an annual basis. If the chargeable percentage in the year used in the Association's example had been 60%, rather than 73%, the fee for objectors would have been only $180, but the Association would have collected $210 before it gave any rebate to nonmembers who objected and challenged the amount of the fee.

However, *Hudson*, 475 U.S. at 309 (emphasis added), held that an "appropriately justified **advance reduction * * * [is] necessary** to minimize both the impingement [of the agency shop on employees' First Amendment interests] and the burden" of objection. "[A]dvance reduction," not "appropriate justification," is the **subject** of the Court's sentence; like the courts in *Damiano v. Matish*, 830 F.2d 1363, 1369-70 (6th Cir. 1987), and *Tierney v. City of Toledo*, 824 F.2d 1497, 1502-04 (6th Cir. 1987), the teachers presume that this Court meant what it said. It would hardly have been necessary to hold that the union must "provide adequate justification for the advance reduction of dues," *Hudson*, 475 U.S. at 309, if no advance reduction at all were required.

Moreover, advance reduction is essential to fulfillment of the principles on which *Hudson* rests. The Association argues that only spending of compulsory fees, not collection, gives rise to constitutional concerns. *See* Opp. at 9-10. It thus ignores two teachings of *Hudson*.

First, although "a 100% escrow completely avoids the risk that dissenters' contributions could be used improperly," additional procedural safeguards "are required because **the agency shop itself** impinges on the nonunion employees' First Amendment interests." *Hudson*, 475 U.S. at 309 (emphasis added). But, if the agency shop impinges on First Amendment rights even with no risk of improper spending, then not only spending constitutes the infringement, but also collection. Consequently, *Hudson*, 475 U.S. at 310 (emphasis added), enunciated "constitutional requirements for the Union's **collection** of agency fees," not just "'a way of preventing compulsory subsidization of ideological activity.'" *id.* at 302 (quoting *Abood*, 431 U.S. at 237).

The Petition at 16, 21-23 & n.27 cited cases, including *Elrod*, 427 U.S. at 355-56 (plurality opinion), which identify part of the First Amendment injury in cases such as this as the inability of individuals to use the funds seized from them for their own causes. *See Rutan v. Republican Party*, 497 U.S. 62, 69 (1990). Yet, the Association doubts that there is any "First Amendment right not to be deprived of the use of one's money," citing the Ninth Circuit majority's view that such a right "would turn every * * * monetary

claim against an entity acting under color of law into a First Amendment case," App. at 7a (punctuation omitted), and *Arcara v. Cloud Books, Inc.*, 478 U.S. 697, 705-06 (1986). Opp. at 12 & n.9. The principle on which the teachers rely is not so broad.

The taking of property to pay civil damages or taxes, or serve other governmental purposes "having nothing to do with" First Amendment conduct at all, as in *Arcara*, 478 U.S. at 705-07, does not give rise to a First Amendment claim simply because it "will have some effect on the First Amendment activities of those subject to" the taking. However, that is not this case.

Here, the taking of property gives rise to a First Amendment claim **because** the taking **serves goals that themselves infringe upon First Amendment freedoms**, as in *Elrod*, *Abood*, *Hudson*, and *Keller v. State Bar*, 496 U.S. 1 (1990). The First Amendment infringement inherent in the taking in these cases is forced association with a political party, union, or bar association through the coerced collection of party contributions, agency fees, or bar dues. *See Keller*, 496 U.S. at 13; *Hudson*, 475 U.S. at 301-02 & nn.8-9; *Elrod*, 427 U.S. at 355.[1] The inability of the individual to use those funds for their own expressive and associational purposes is an **additional** effect of the forced association recognized in *Elrod*, 427 U.S. at 355-56, and the other cases cited by the teachers. *See* David B. Yelin, *Constitutional Considerations Affecting the Methods of Exacting Union "Fair Share" Collective Bargaining Fees from Non-Member Public Employees*, 1985 Det. C.L. Rev. 767, 790-91.

When free association is infringed, even if only partially, as by the contribution limitations in *Buckley v. Valeo*, 424 U.S. 1, 22-23 (1976), the infringement may be sustained only "if the State demonstrates a sufficiently important interest and employs means **closely drawn** to avoid **unnecessary** abridgment of associational freedoms." *Id.* at 25 (emphasis added). In *Abood*, *Hudson*, and *Keller*, the Court found such a state interest, but only to the extent that compulsory fees are limited to a proportionate share of the costs

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[1] "Compelled support of a private association is fundamentally different from compelled support of government." *Abood*, 431 U.S. at 259-n.13 (Powell, J., concurring in judgment); *see Buckley v. Valeo*, 424 U.S. 1, 91 & n.124 (1976).

of certain functions of a union or integrated bar **and** are collected with certain "carefully tailored" procedural safeguards. *Hudson*, 475 U.S. at 302-03; *see Keller*, 496 U.S. at 13-17.

"Careful" or "narrow tailoring," at a minimum, "require[s] the government goal to be substantial, and the cost to be **carefully** calculated. Moreover, since the State bears the burden of justifying its restrictions, it must **affirmatively establish** the reasonable fit" between the restrictions and the state's objective. *Board of Trustees v. Fox*, 492 U.S. 469, 480 (1989) (emphasis added) (citation omitted).

Second, in "this context, the procedures required by the First Amendment also provide the protections necessary for any deprivation of property." *Hudson*, 475 U.S. at 304 n.13. "[E]ven the temporary or partial impairments to property rights that attachments, liens, and similar encumbrances entail are sufficient to merit due process protection." *Connecticut v. Doehr*, 111 S. Ct. 2105, 2113 (1991). The Association ignores this fact. However, even if the deprivation is only temporary, determining the adequacy of predeprivation procedures requires consideration of the private interests affected, the risk of erroneous deprivations and the probable value of additional or other procedural safeguards, and the state's interest in imposing the temporary deprivation. *Id.* at 2112.

Escrow without advance reduction satisfies neither First Amendment careful tailoring nor the due-process test. "'Precision * * * must be the touchstone' in the First Amendment context." *Hudson*, 475 U.S. at 303 n.11 (quoting *NAACP v. Button*, 371 U.S. 415, 438 (1963)). Collection of monies that indisputably will not be used for lawfully chargeable activities, even if escrowed and later rebated, is inherently **im**precise. It thus violates the First Amendment, because it is a means "substantially broader than necessary to achieve the government's interest," *Ward v. Rock Against Racism*, 491 U.S. 781, 800 (1989), in seeing that all employees subsidize only chargeable activities.

Collection of nonchargeable amounts also denies due process. It presents a **certainty** of erroneous deprivation, even if only temporary. And it adversely affects the individual's First Amendment interests in not associating with a union more than necessary

to serve the state's interest in mandatory association and in "us[ing h]is property for his own preferred political, ideological or other elected purposes." *Damiano*, 830 F.2d at 1370.

The sole rationalization the Association advances for not providing advance reduction is imagined administrative and financial burdens that would be imposed on it and the school districts that deduct the agency fees. *See* Opp. at 6. However, "administrative convenience alone is insufficient to make valid what otherwise is a violation of due process of law," *Cleveland Bd. of Educ. v. LaFleur*, 414 U.S. 632, 647 (1974); "[n]or is additional expense occasioned by [meeting the ordinary standards of due process] sufficient to withstand the constitutional requirement." *Bell v. Burson*, 402 U.S. 535, 540-41 (1971). Therefore, "the procedures mandated by *Hudson* are to be accorded all nonmembers of agency shops regardless of whether the union believes them to be excessively costly." *Andrews v. Cheshire Educ. Ass'n*, 829 F.2d 335, 339 (2d Cir. 1987); *accord Lowary v. Lexington Local Bd.*, 903 F.2d 422, 431 (6th Cir.), *cert. denied*, 498 U.S. 958 (1990).

In any event, the burdens feared by the Association are spurious, as the dissenting member of the Ninth Circuit panel explained at greater length than is possible here. *See* App. at 15a-18a. This is confirmed by the fact that at least three other teacher unions have implemented plans which provide both pre-collection notice, after the school year begins, and an advance reduction, with no apparent undue burden. *See Andrews*, 829 F.2d at 337-38; *Lehnert v. Ferris Faculty Ass'n*, 707 F. Supp. 1490, 1496-97 (W.D. Mich.), *aff'd*, 893 F.2d 335 (6th Cir. 1989), *cert. denied*, 496 U.S. 905 (1990); *Lowary v. Lexington Local Bd.*, 704 F. Supp. 1456, 1474-75 (N.D. Ohio 1988), *modified on other grounds*, 903 F.2d 422 (6th Cir.), *cert. denied*, 498 U.S. 958 (1990).

The Association asserts that the "parties have stipulated that there were legitimate reasons for [its] choice" in not providing the teachers an advance reduction. Opp. at 12 n.16 (emphasis omitted). However, all that the parties stipulated was that **the Association** "considered" advance reduction "unworkable" for the reasons it stated in the stipulation. The parties did **not** stipulate that advance reduction in fact was unworkable or that the reasons given by the

Association for not using it were legitimate in fact or law. *See id.* at 6.

III. PRE-COLLECTION NOTICE OF THE BASIS FOR THE FEE CHARGEABLE TO OBJECTORS IS REQUIRED TO FACILITATE OBJECTIONS AND ENSURE DUE PROCESS, EVEN IF THE ENTIRE FEE IS ESCROWED

The Association concedes that pre-collection notice of the basis for the fee chargeable to objectors is required if an advance reduction is required. *See id.* at 14 n.12. In that event, pre-collection notice is necessary to enable an objecting nonmember to pay only the reduced amount determined by the union.

Otherwise, the Association argues that "the 'advance notice' issue * * * is of no constitutional significance." If advance reduction is not required, all fees are escrowed until the time for objection passes, and notice precedes the hearing (which need not occur before fees are collected), the union claims "there is absolutely no reason why the notice should have to precede the first monthly payroll deduction." *Id.* at 13-14. However, there are constitutional reasons for pre-collection notice even in those circumstances.

The purpose of notice is not **only**, in general under the due process clause, to apprise an affected individual of an impending hearing, or in specific under *Hudson*, as the Association asserts, "to enable nonmembers to exercise their right to object and to prepare for the hearing" on the lawfulness of the amount of the fee before an impartial decisionmaker, *id.* at 13. Notice also serves other constitutional purposes.

In general, a "purpose of procedural due process is to convey to the individual a feeling that the government has dealt with him fairly, as well as to minimize the risk of mistaken deprivations of protected interests." *Carey v. Piphus*, 435 U.S. 247, 262 (1978); *accord Williamson County Regional Planning Comm'n v. Hamilton Bank*, 473 U.S. 172, 195 n.14 (1985). Taking an individual's property without at least first giving him notice of the grounds for the taking, and that he will later have an opportunity to challenge those grounds, conveys precisely the opposite conviction. It thus is contrary to *Hudson*'s goal of "insur[ing] that the government treads

with sensitivity in areas freighted with First Amendment concerns." 475 U.S. at 303 n.12 (emphasis added). *Cf. Barry v. Barchi*, 443 U.S. 55, 65 (1975) (a procedure under which a horse trainer's license was suspended without a pre-suspension hearing did not deny due process, because, *inter alia*, "he was immediately notified of the alleged drugging [and] 16 days elapsed **prior to** the imposition of the suspension") (emphasis added).[4]

In specific, a purpose of the procedural safeguards required by *Hudson*, 475 U.S. at 307 n.20, is to "facilitate a nonunion employee's ability to protect his rights." Collection of a compulsory fee without prior notice of its basis "present[s] the deprived party with a *fait accompli*" that discourages, rather than facilitates, challenges to the fee. *See Gilpin v. AFSCME*, 643 F. Supp. 733, 737 (C.D. Ill. 1986). As one scholar pointed out even before *Hudson*, "to effectuate fully the goals underlying *Abood*," a union should be required to make a schedule of yearly disbursements "available for inspection by all employees * * * *before* an employee has parted with his money," because there "will thus be more assurance that inertia will not persuade a dissenter to relinquish his constitutionally protected right to freedom of association." *The Supreme Court, 1976 Term*, 91 Harv. L. Rev. 70, 198 (1977) (quoted with approval in *Galda v. Bloustein*, 686 F.2d 159, 168 n.16 (3d Cir. 1982)).

Finally, the Association's claim that there is no conflict among the circuits, or within the Ninth Circuit, as to advance notice is disingenuous. *See* Opp. at 15. In *Tierney*, 824 F.2d at 1501, the union's scheme required nonmembers to pay an agency fee equal to dues **before** it provided them with information concerning the purposes for which the fees would be used. Thus, the Sixth Circuit necessarily had to decide whether the union violated the nonmembers' constitutional rights by demanding payment before it gave

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[4] *Memphis Light, Gas & Water Division v. Craft*, 436 U.S. 1 (1978), cited in the Opposition at 13 n.11, does not support the union's argument that due process never requires notice prior to a taking if a pre-taking hearing is unnecessary. *Memphis Light*, 436 U.S. at 14-15 (emphasis added), held that notice "does not comport with constitutional requirements when it does not advise the customer of the availability of a procedure for protesting a **proposed** termination of utility service." In short, the Court saw pre-taking notice as constitutionally necessary.

notice of the basis for the fee. When the court said that the scheme's "second infirmity is that it contains no provision complying with *Hudson*'s requirement that detailed financial information concerning all major categories of union expenses * * * be * * * provided to all non-members **before any fees may be collected from them**," *id.* at 1506 (emphasis added), it was stating a holding, not *dictum* as the Association pretends. Similarly, because the union in *Dean v. TWA*, 924 F.2d 805, 807 (9th Cir. 1991), demanded payment of agency fees equal to dues without notice of how they would be spent, the court there also stated a holding when it said that *Hudson* requires "that **before collecting fees** through an agency shop agreement, a union must adequately explain the basis for the fee," *id.* at 808 (emphasis added).

CONCLUSION

Whether advance reduction and advance notice must constitutionally be provided to individuals paying compulsory fees are questions which were important enough for this Court to grant certiorari in *Gibson v. Florida Bar*, 906 F.2d 624 (11th Cir. 1990), *cert. granted*, 111 S. Ct. 1305 (1991) (No.90-1102). The Court did not then settle these questions, because it dismissed the *Gibson* writ as improvidently granted after the adoption of an advance reduction system in *Florida Bar re Frankel*, 581 So. 2d 1294 (Fla. 1991), while *Gibson* was pending in this Court. *See Gibson v. Florida Bar*, 112 S. Ct. 633 (1991). Because these questions are no less important now, and because the courts of appeals are still in conflict on them, the Court should grant certiorari in this case.

Respectfully submitted,

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